

“TWITTER JAIL” FOR THE JAILER: THE
 PRECARIOUS FIRST AMENDMENT RIGHTS
 OF POLICE OFFICERS TO SHARE
 WORKPLACE CONCERNS ON SOCIAL
 MEDIA

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INTRODUCTION

As the United States wrestled with an overdue reckoning about abusive policing practices directed toward people of color, police officers found themselves called to account for social media posts using racial slurs or celebrating violence inflicted on racial-justice protesters.¹ While officers undoubtedly have engaged in tasteless “locker-room banter” for as long as policing has existed, those conversations generally dissipated without reaching public ears. But social networking sites have a long reach and a long memory.

The visibility of offensive online speech is provoking difficult conversations about the extent to which the “personal” and the “professional” can be separated, or whether the Internet now collapses the two worlds so that repugnant remarks made in the “off-duty” world should carry “on-duty” consequences.² The Supreme Court recently struggled to make sense of this issue,

¹ See Kyle Stucker, *First Amendment vs. Public Duty: Police Social Posts Renew Concerns About Bias, Solutions*, PROVIDENCE J., <https://www.providencejournal.com/story/news/2021/10/26/police-officers-racist-inappropriate-social-media-posts-can-draw-criticism-reveal-bias/6108222001/> [<https://perma.cc/C25B-WKUQ>] (Oct. 27, 2021, 12:18 PM) (enumerating instances in which officers’ racist or anti-Semitic social media posts have come to light in Massachusetts, Rhode Island, and Vermont, and observing that while police have faced consequences for offensive online behavior since the advent of social media, scrutiny has intensified in light of racial-justice concerns surrounding policing); see also Emily Hoerner & Rick Tulskey, *Cops’ Troubling Facebook Posts Unveiled*, INJUSTICE WATCH (Jun. 1, 2019), <https://www.injusticewatch.org/interactives/cops-troubling-facebook-posts-revealed/> [<https://perma.cc/QZ7H-7GKW>] (reporting results of research by Philadelphia attorney who reviewed 3,500 Facebook accounts belonging to present or former police officers in eight cities, which found posts by hundreds of officers “displaying bias, applauding violence, scoffing at due process, or using dehumanizing language”).

² See Frank D. LoMonte, *The “Social Media Discount” and First Amendment Exceptionalism*, 50 U. MEM. L. REV. 387, 406 (2019) (citing the case of a Georgia teacher forced to resign for posting Facebook photos in which she legally drank alcoholic beverages on personal, off-duty time as an illustration of the growing mentality among workplace supervisors that harmless and lawful behavior becomes grounds for discipline for no other reason than that it was visible on social media and caused someone to complain). For a recent example of overzealous social media policing, see Wayne Carter, *District Calls Anniversary Photo of High School Principal and His Wife ‘Questionable’*, NBC DALL. FORT WORTH, <https://www.nbcdfw.com/news/local/carter-in-the-classroom/district-calls-anniversary-photo-of-high-school-principal-and-his-wife-questionable/2704613/> [<https://perma.cc/NK5G-VP5H>] (Aug. 3, 2021, 9:25 AM) (describing controversy that erupted when Texas high-school principal, who is in an interracial marriage, shared Facebook photos of he and his

somewhat unsatisfactorily, in the case of a Pennsylvania cheerleader disciplined for venting her displeasure with school in a profane Snapchat post.³ Online speech by law enforcement officers presents a special case; unlike high school cheerleaders, they occupy sensitive positions of public trust and wield the power to use deadly force. Accordingly, it is difficult to argue that what a police officer says on Saturday afternoon on social media is irrelevant to whether the officer should continue carrying a badge and gun on Monday morning.

Still, boundaries exist. The Supreme Court has long recognized—and once again underscored, in its 2021 “cursing cheerleader” case—that political and religious speech occupies a position of special First Amendment solicitude.⁴ The Court has also recognized that public employees are uniquely positioned to share inside knowledge about the workings of government, and that the First Amendment should be interpreted to protect their ability to blow the whistle on government wrongdoing.⁵ This presents a challenge for law enforcement agencies in crafting policies that regulate employee speech: how can two imperatives—the interests of police officers in sharing knowledge about issues of public concern, and the public’s interest in a police force free from bigotry and bias—be accommodated at once?

In what is arguably the clearest and most detailed attempt at line-drawing to date, the federal Fourth Circuit, in *Liverman v. City of Petersburg*, found that a Virginia police department violated the First Amendment in forbidding officers from using social media to make “negative comments” about the police force, even when out of uniform on their own time.⁶ Since that 2016 ruling, the Ninth and Eleventh Circuits have essentially adopted a *Liverman*-type analysis, siding with employees who facially challenged restrictive social media policies.⁷ These decisions represent a growing consensus that police department policies must leave room for officers to discuss matters of public

wife embracing while wearing swimsuits, which a district supervisor instructed him to remove from social media after a local parent complained).

³ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2042–43 (2021); see also Jenny Diamond Cheng, *Deciding Not to Decide: Mahanoy Area School District v. B.L. and the Supreme Court’s Ambivalence Towards Student Speech Rights*, 74 VAND. L. REV. 511, 518 (2021) (stating that the Court’s narrow ruling in *Mahanoy* “offers little clarity for schools and students grappling with truly thorny questions about off-campus student speech” and “leaves open more questions than it answers”).

⁴ *Mahanoy*, 141 S. Ct. at 2046 (“When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.”).

⁵ See *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (stating that “[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions”).

⁶ See generally *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016).

⁷ See *Hernandez v. City of Phoenix*, 43 F.4th 966, 978 (9th Cir. 2022); see also *Little v. Palm Beach*, 30 F.4th 1045, 1055 (11th Cir. 2022).

concern while off-the-clock, even if the discussion reflects adversely on the employer.

This Article considers the issue of “policing the police” in their online lives through the lens of the *Liverman* case. The authors examine whether prevailing policies in effect at major metropolitan law enforcement agencies align with—or trample over—the First Amendment as understood by the Fourth Circuit in *Liverman* and the more recent cases applying it. The Article concludes that there is no doctrinally sound argument for limiting law enforcement employees’ social media speech as stringently as many localities attempt to do, and further, that such restrictive policies hurt both the gagged officers and the public.

Part I sets forth the baseline First Amendment principles that, outside of the employee-employer relationship, strictly constrain public agencies’ ability to regulate speech, especially speech critical of government officials and practices. It explains how, in the government employment context, these long-established First Amendment principles sometimes give way to government agencies’ interest in maintaining an effective workplace. And it describes how the Supreme Court has resisted entreaties to diminish free speech protections in the internet age.

Part II discusses how courts have applied these First Amendment standards when disputes arise over law enforcement agencies’ policies. It examines the *Liverman* decision and comparable rulings in the context of police discipline for social media speech to distill some consensus principles about where disciplinarians’ authority begins and ends. In particular, Part II considers whether the First Amendment allows a law enforcement agency to control employees’ off-hours speech for purposes of preserving the agency’s reputation—which would be a clearly impermissible purpose for restricting speech *outside* the workplace setting. Part II also describes how one federal circuit—the Sixth—has diverged from the consensus and rejected First Amendment challenges to heavy-handed workplace speech policies, even those that are reputation-based.

Part III turns to an analysis of policies collected by researchers at the Brechner Center for Freedom of Information from police departments and sheriff’s offices across the country, and how those policies measure up against the First Amendment standards established by *Liverman* and its progeny. Part IV discusses the legal and policy arguments for and against rigidly restricting what police officers can say on social media in light of the uniquely sensitive role that officers occupy in contemporary society. The Article concludes by arguing for a balanced regulatory approach, recognizing that it is probably both impossible and unwise to enforce a “zero-controversy” standard in online speech, and that the public’s interest in receiving information about law enforcement requires establishing clear boundaries so speakers feel confident sharing information of civic value.

I. LEGAL BACKGROUND

A. *The First Amendment Inside, and Outside, the Workplace*

Outside of the workplace, the First Amendment is understood to protect vigilantly against any government action that forbids speech in advance (a “prior restraint”) or imposes after-the-fact punishment that intimidates speakers into silence. With the exception of a few extreme categories—obscenity, “true threats” of violence, inciting others to imminent lawlessness—government agencies are powerless to regulate speech based on the content of the speaker’s message.⁸ Any content-based restriction on speech starts with a heavy presumption of unconstitutionality and will be upheld only if it is narrowly tailored to serve a compelling government purpose and restricts no more speech than necessary in achieving that objective.⁹

Courts have reserved special enmity for government actions that discriminate based on a speaker’s viewpoint—that is, allowing only one side of a contested issue to be heard, or affording one side a preferred position.¹⁰ In finding that the University of Virginia violated the First Amendment by declaring a student newsmagazine ineligible for funding because of the authors’ Christian religious perspective, the Supreme Court declared that viewpoint discrimination is “an egregious form of content discrimination.”¹¹ Courts likewise disapprove of restrictions on speech that are motivated by the anticipated adverse reaction of audience members. Giving effect to this so-called “heckler’s veto” allows people to silence their political opponents by asserting that they are offended, a backdoor form of viewpoint discrimination.¹² If audience

⁸ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (stating that the First Amendment forbids regulating on the basis of content except for “a few limited areas,” such as obscenity, where the Court has found the speech to be of such minimal expressive value that it must yield to weightier societal interests).

⁹ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

¹⁰ See Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19, 29 (2018) (Explaining that “if the relevant subject or category of speech is abortion, viewpoint censorship occurs when the government allows pro-choice views but not pro-life ones. At a city council meeting, in turn, viewpoint discrimination transpires when the council stifles citizens who criticize measures the council supports but permits speech by individuals who laud them.” (citation omitted)).

¹¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹² See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (Holding that a county may not charge a heightened fee for police protection of demonstrators based on the anticipation that counter-protesters will react violently: “Listeners’ reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”).

members disrupt constitutionally protected speech or threaten to do so, the government's imperative is to protect the speaker, not to indulge the hecklers.¹³ These principles—that government agencies may not privilege one side in a debate, and that regulations may not be based on the anticipated overreaction of the thinnest-skinned listeners—are relevant in assessing how aggressively public employers may regulate online speech, and for what reasons.

Speech-restrictive policies are regularly declared unconstitutional on the grounds of vagueness or overbreadth.¹⁴ A regulation is void for vagueness if it fails to give a speaker fair warning of what speech is and is not punishable.¹⁵ A regulation is fatally overbroad if it penalizes substantially more speech than is necessary to achieve the government's purpose.¹⁶ These constraints on government authority apply within the workplace as well. In one illustrative case, *Barrett v. Thomas*, the Fifth Circuit ruled in favor of sheriff's department employees challenging a workplace policy that forbade "unauthorized public statements" or comments to journalists on any topic "that is or could be of a controversial nature."¹⁷ The court stated that the policy was so poorly tailored that "either vagueness or overbreadth standing alone would present a fatal defect in the regulations."¹⁸

A speech-restrictive regulation that confers unfettered discretion on government officials is constitutionally suspect both as a matter of First Amendment law and as a matter of due process.¹⁹ Any regulation that sets up a

¹³ Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007).

¹⁴ See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 362, 366 (1964) (holding that laws requiring state employees to swear loyalty oath forsaking involvement in "subversive" organizations or activities were unconstitutional "because their language is unduly vague, uncertain and broad" (quoting WASH. REV. CODE § 9.81.010(5))); *NAACP v. Button*, 371 U.S. 415, 432–33 (1963) (Invalidating state law prohibiting civil-rights attorneys from engaging in "solicitation" for clients, and explaining: "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.").

¹⁵ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

¹⁶ See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (stating that "a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep" (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982))).

¹⁷ *Barrett v. Thomas*, 649 F. 2d 1193, 1199 (5th Cir. 1981).

¹⁸ *Id.* at 1198.

¹⁹ See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("Invariably, the Court has felt obliged to condemn systems in which the exercise of [speech-permitting] authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too

government official as gatekeeper over speech must contain neutral and objective standards, so permission to speak cannot be selectively granted or withheld based on the speaker's viewpoint.²⁰ Unbridled discretion has proven fatal to workplace speech restrictions in cases such as *Swartzwelder v. McNeilly*, in which the Third Circuit struck down a Pittsburgh Police Bureau directive forbidding any officer from testifying as an expert witness without written approval from the police chief.²¹ In an opinion written by then-Judge Samuel Alito, the court deemed the policy to be "so open-ended that it creates a danger of improper application" because it allowed city authorities to veto any officer's planned testimony if they questioned its "validity."²²

Of potential relevance to claims of employee misconduct on social media, the federal courts have recognized a narrow First Amendment exception for speech that is incident to unlawful conduct, or where the government is punishing the non-speech aspects of expressive conduct.²³ For instance, the act of repeatedly placing unwanted phone calls for purposes of harassment can be criminally prosecuted, even though the words spoken into the phone are expressive.²⁴ In this same way, a police department might constitutionally punish a police officer who brags on social media about brutalizing a suspect or indicates a future propensity to do so—not because of the speech, but because of the behavior that it signifies.

Of all forms of expression, the First Amendment most fiercely protects the right to criticize government policies and officials—even harshly, and even when the criticism is factually inaccurate.²⁵ Speech about the workings of government, the Supreme Court has insisted, occupies a specially protected perch in the First Amendment hierarchy, because the ability to challenge the government is central to the purpose of the free speech clause.²⁶ Speech

great where officials have unbridled discretion over a forum's use."); *see also* *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.").

²⁰ *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 753, 760 (1988).

²¹ *Swartzwelder v. McNeilly*, 297 F.3d 228, 231–32, 241–42 (3d Cir. 2002).

²² *Id.* at 240.

²³ *See United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (finding that federal statute outlawing stalking was constitutional because it criminalized primarily conduct and not speech).

²⁴ *See State v. Fin. Am. Corp.*, 440 A.2d 28, 30 (N.J. Super. Ct. App. Div. 1981) ("Harassing phone calls are not entitled to First Amendment protection.").

²⁵ *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (holding that a newspaper advertisement that was interpreted as criticism directed at Alabama police commissioner's civil-rights record did not lose First Amendment protection merely because it contained some factual inaccuracies because "erroneous statement is inevitable in free debate").

²⁶ *See Garrison v. Louisiana*, 379 U.S. 64, 64–65, 67, 74–75 (1964) (overturning conviction of district attorney who was prosecuted for criticizing the conduct of local judges, and

exposing government wrongdoing has particular value, so that, in the view of federal courts, whistleblowers enjoy substantial constitutional protection against government retaliation.²⁷

But the Court has drawn a distinction between the government's role in regulating the citizenry versus the government's role in managing public property where people must coexist in confined spaces: prisons, jails, schools, and the workplace.²⁸ When the government is wearing the hat of "service provider" rather than "regulator," free speech rights diminish and the burden to justify content-based restrictions on speech is somewhat relaxed in deference to the government's interest in maintaining an orderly workplace that effectively achieves its public purpose.²⁹ The Supreme Court has held that

[t]he government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise the conduct of public employees. . . . Restraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest.³⁰

Courts have given special latitude to the armed forces to regulate the speech of military personnel, on the basis that military service requires surrendering a variety of personal freedoms, and that the military's effectiveness in combat depends on willingness to obediently follow orders.³¹ As the Supreme Court has stated:

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by

observing that "speech concerning public affairs is more than self-expression; it is the essence of self-government"); *see also* *Roth v. United States*, 354 U.S. 476, 484 (1957) (stating that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

²⁷ *See Swineford v. Snyder Cnty.*, 15 F.3d 1258, 1274 (3d Cir. 1994) ("Speech involving government impropriety occupies the highest rung of First Amendment protection.").

²⁸ *See* Erwin Chemerinsky, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 *FIRST AMEND. L. REV.* 291, 296 (2013) (asserting that, while the contemporary Supreme Court has been protective of the First Amendment generally, it has exhibited "great judicial deference to authoritarian institutions, like schools, prisons, military, and so on").

²⁹ *See Waters v. Churchill*, 511 U.S. 661, 673 (1994) (stating that courts "have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large").

³⁰ *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386–87 (2011).

³¹ *See Parker v. Levy*, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.³²

Some courts have extended that extra-strength deference to law enforcement agencies as well, characterizing service on a police force as a form of quasi-military engagement.³³

Free-speech claims can arise in a variety of ways. Courts can order injunctive relief from constitutionally infirm policies. A plaintiff might challenge a speech-restrictive regulation “as-applied” (meaning in that speaker’s particular context) or “facially” (meaning that the regulation is so overbroad that it sweeps in substantial types of harmless or beneficial speech along with the harmful speech it purports to restrict).³⁴

Plaintiffs also can seek money damages from government employees who violate their constitutional rights by invoking the Ku Klux Klan Act of 1871 (referred to today as “Section 1983”), which states that any person who violates federally protected rights while acting “under color of” governmental authority can be subject to suit.³⁵ While Section 1983 was originally enacted to enforce the Fourteenth Amendment’s guarantees against state deprivations of rights without due process in light of Reconstruction, it remains a popular vehicle for getting a damages claim into federal court to the present day.³⁶

To establish a *prima facie* Section 1983 claim, a plaintiff must show first that the defendant acted under color of state law,³⁷ and secondly that the action deprived the plaintiff of a constitutional or statutory right.³⁸ A speech-restrictive workplace policy can lead to Section 1983 liability if it violates public employees’ clearly established constitutional rights.³⁹ When free

³² *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

³³ *See Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (contrasting considerable First Amendment protection afforded to college professors with relatively more limited freedom afforded to police officers: “Police are at the restricted end of the spectrum because they are ‘paramilitary’—discipline is demanded, and freedom must be correspondingly denied.”); *see also Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983) (stating, in context of state trooper’s First Amendment retaliation claim, that Missouri Highway Patrol, “as a paramilitary force, should be accorded much wider latitude than the normal government employer in dealing with dissension within its ranks”); Lilli B. Wofsy, *Will I Get Fired for Posting This?: Encouraging the Use of Social Media Policies to Clarify the Scope of the Pickering Balancing Test*, 51 SETON HALL L. REV. 259, 276–77 (2020) (collecting cases and observing that “police departments are one workforce where there has been an emphasis on deference. . . . Police departments and fire departments often work together to protect the lives of one another and endangered civilians, which has been viewed as heightening the need for loyalty, discipline, and workplace harmony.”).

³⁴ Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010).

³⁵ 42 U.S.C. § 1983.

³⁶ George S. Scoville III, *Purged by Press Release: First Responders, Free Speech, and Public Employment Retaliation in the Digital Age*, 97 OR. L. REV. 477, 486 (2019).

³⁷ *United States v. Classic*, 313 U.S. 299, 326 (1941).

³⁸ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002).

³⁹ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

speech is the right at issue, that speech must be a substantial factor in the adverse employment action that the plaintiff is seeking redress for.⁴⁰

B. The Pickering and the Pendulum

The Supreme Court has established two parallel analytical frameworks for addressing First Amendment claims arising in the government workplace. Where the regulation categorically restricts employees, or some subset of employees, from ever making themselves heard, the analysis is simple: the regulation is a “prior restraint” that bears a demanding burden of justification.⁴¹

In *United States v. National Treasury Employees Union* (“*NTEU*”), the Court analyzed a prospective ban on speaking fees for executive branch officials and members of Congress.⁴² Finding that the ban on fees was so burdensome that it was tantamount to a prohibition on speech, particularly for lower-paid federal workers, the Court applied heightened scrutiny.⁴³ It did not matter, in the Court’s view, that speech was merely being burdened and not entirely forbidden; as long as the purpose and effect of the restriction is to chill speech as a whole, the restriction is a presumptively unconstitutional prior restraint.⁴⁴ Importantly, the Court recognized that the burden to justify a categorical restriction on speaking is much greater than to justify an “isolated disciplinary action” for a particular instance of speech.⁴⁵

Notwithstanding the judiciary’s traditional deference to military and law enforcement agencies, police have prevailed in facial challenges to overbroad policies that categorically restrain officers from speaking publicly about work-related matters—even before the Supreme Court spoke in *NTEU*.⁴⁶ For

⁴⁰ *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). *Mt. Healthy*, which involved an outspoken Ohio schoolteacher whose contract was not renewed after several clashes with his supervisors, including leaking a memo about an employee dress-code controversy to a local radio news station, was superseded in part by statute when Congress enacted the Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1). *Id.* at 281–82. The Act statutorily modifies the *Mt. Healthy* analysis by establishing a “contributing factor” threshold test to adjudicate federal whistleblowers’ retaliatory termination suits. 5 U.S.C. § 1221(e)(1).

⁴¹ See Ariel L. Bendor & Michal Tamir, *Prior Restraint in the Digital Age*, 27 WM. & MARY BILL RTS. J. 1155, 1159 (2019) (explaining that, under the doctrine of prior restraint, “the government and the courts are not permitted to restrain expressions before they are disseminated—either by administrative licensing regimes or by judicial injunctions—even if they may be constitutionally subjected to subsequent civil or criminal sanctions” (citation omitted)).

⁴² *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 457 (1995).

⁴³ *Id.* at 469–70.

⁴⁴ *Id.* at 468.

⁴⁵ *Id.*

⁴⁶ *Lauretano v. Spada*, 339 F. Supp. 2d 391, 414–15, 424–25 (D. Conn. 2004) (concluding that state highway patrol could not lawfully enforce a rule that forbade officers from making “official comments relative to department policy” to members of the press or public without supervisory approval).

example, as early as 1970, the Seventh Circuit held that a police department rule exposing officers to discipline for “any activity, conversation, deliberation, or discussion which is derogatory to the Department or any member or policy of the Department” was—“beyond dispute”—an unconstitutionally broad infringement on the officers’ First Amendment rights.⁴⁷

Officers have also prevailed when challenging content—or viewpoint—based restraints that selectively restrict certain disfavored speech; for instance, a New Jersey court invalidated a police department policy that forbade “[p]ublicly criticizing the official action of a superior officer” as unduly broad.⁴⁸ *NTEU* remains the standard when courts are faced with broad prior restraints on employee speech, and could be implicated by a pre-enforcement facial challenge to a restrictive social media policy.

In the event of an “isolated disciplinary action,”⁴⁹ as opposed to a facial challenge to a blanket prohibition on speaking, the analysis is more complicated. Solicitude for employee speech rights has waxed and waned with the makeup and ideology of the Court, but it is widely accepted that First Amendment rights diminish—at least to some extent—within the workplace.

Arguably the high-water mark for public employees came in the Court’s 1968 ruling in *Pickering v. Board of Education*, in which the justices held that when public employees speak on matters of public concern, they retain a high degree of constitutional protection.⁵⁰ *Pickering* involved an Illinois high school teacher fired for a letter-to-the-editor urging voters to oppose a school bond referendum that his employer supported.⁵¹ The Court in *Pickering* set up a two-pronged test to analyze whether the employer has the authority to discipline the employee for speaking. First, the Court analyzed the content and circumstances of the speech, determining whether the speaker was speaking on a matter of public concern as a private citizen.⁵² Then, the Court analyzed whether the speech jeopardized workplace harmony or effectiveness enough to override the speaker’s rights.⁵³

In *Pickering*, the subject matter of the disagreement—whether the school district spent its money wisely and deserved to be given more—indisputably qualified as a matter of public concern. Subsequent courts have elaborated on what does and does not constitute a matter of public concern on which employees may speak out within the protection of the First Amendment:

⁴⁷ *Muller v. Conlisk*, 429 F.2d 901, 902–03 (7th Cir. 1970).

⁴⁸ *Hall v. Mayor & Dir. of Pub. Safety*, 422 A.2d 797, 798, 800 (N.J. Super. Ct. App. Div. 1980).

⁴⁹ *Nat’l Treasury Emps. Union*, 513 U.S. at 468.

⁵⁰ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

⁵¹ *Id.* at 565–66.

⁵² *Id.* at 568.

⁵³ *Id.*

contested political and social issues obviously qualify,⁵⁴ as do issues of public health and safety.⁵⁵ Even issues internal to the workplace may qualify if they affect employees as a whole and not just the speaker.⁵⁶ In the context of policing, it is well-accepted that concerns about how police do their jobs qualifies as a matter of public concern, even when those speaking are themselves employed in law enforcement.⁵⁷

After *Pickering*, the pendulum began swinging in the direction of employer discretion and away from speakers' rights. In *Connick v. Myers*, the Supreme Court took a relatively narrow view of what qualifies as protected speech in the workplace, holding that "an employee grievance concerning internal office policy" is not a matter of public concern that implicates the protection of the First Amendment.⁵⁸ Then in *Garcetti v. Ceballos*, the Court held that statements made by public employees in the course of their employment, pursuant to their official duties, are not protected speech.⁵⁹ In *Garcetti*, a deputy district attorney wrote a memo and gave testimony suggesting that a case being prosecuted by his agency was based on a falsified search warrant affidavit.⁶⁰ The Court distinguished between speech that is merely "related to the speaker's job," which remains constitutionally protected, and speech that is itself a job assignment, such as writing a memo to a supervisor: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."⁶¹

⁵⁴ See *Rankin v. McPherson*, 483 U.S. 378, 386–87 (1987) (finding that employee of county constable's office spoke on a matter of public concern when she expressed her hope that an assassin succeed in killing President Reagan, whose policies she opposed).

⁵⁵ See, e.g., *Kessler v. City of Providence*, 167 F. Supp. 2d 482, 486 (D.R.I. 2001) ("[P]olice department policies, procedures, and rules" are matters of public concern because of potential effects on public safety.); *Int'l Ass'n of Firefighters Loc. 3233 v. Frenchtown Charter Twp.*, 246 F. Supp. 2d 734, 737 (E.D. Mich. 2003) (holding that labor disputes and alleged violations of workplace safety laws are matters of public concern).

⁵⁶ See *Buddenberg v. Weisdack*, 939 F.3d 732, 739 (6th Cir. 2019) (holding that bookkeeper for health department addressed matters of public concern when she complained about "a conflict of interest by her supervisor, sex-based pay disparities within the Health District, and several other instances of maladministration"); see also *Meyers v. City of Cincinnati*, 934 F.2d 726, 729–30 (6th Cir. 1991) (finding that assistant fire chief spoke on a matter of public concern in voicing reservations about his agency's affirmative-action efforts to help nonwhite candidates secure promotions).

⁵⁷ See *Brawner v. City of Richardson*, 855 F.2d 187, 191–92 (5th Cir. 1988) ("The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department." (citation omitted)).

⁵⁸ *Connick v. Myers*, 461 U.S. 138, 154 (1983).

⁵⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

⁶⁰ *Id.* at 414–15.

⁶¹ *Id.* at 421.

As modified by *Connick* and *Garcetti*, the *Pickering* analysis functions as a burden-shifting mechanism with several analytical steps:

- (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.⁶²

Although a plain reading of *Garcetti* suggests that it functions as a limited exception to *Pickering*'s normal rule, lower courts have found it confusing to determine when speech is made pursuant to an employee's official duties and have applied definitions of varying breadth, producing inconsistent results.⁶³ The broad misapplication of *Garcetti*'s unclear guidance led one prominent First Amendment scholar to label the decision as one of the most damaging Supreme Court opinions of the modern day.⁶⁴ Another critic summed up the scholarly consensus this way: "*Garcetti* not only fails to protect government employers but also fails to protect the general public by undermining the importance of a public employee's ability to inform citizens of important issues within their government job and alert the public to danger or corruption."⁶⁵

The combined result of these cases has turned the government workplace into something of a free speech minefield. Employees may lose a First Amendment case against their employer at any one of several stages: (1) the speech may not have been made in the employee's off-duty capacity as a citizen, (2) the speech may not pertain to a matter of public concern, or (3) the speech may, on balance, cause such disharmony in the workplace that the employer's interests overcome the employee's. Any one of these findings will be fatal to a First Amendment claim as a matter of law.

The pendulum swung back in the direction of employee rights in the Court's most recent gloss on the *Pickering* standard, *Lane v. Franks*.⁶⁶ *Lane* was a true "whistleblowing" case, in which the speaker, an administrator within the Alabama community college system, alleged that he was fired in retaliation for testifying in the fraud trial of a state politician who had secured

⁶² *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1302 (10th Cir. 2009).

⁶³ See Madyson Hopkins, Note, *Click at Your Own Risk: Free Speech for Public Employees in the Social Media Age*, 89 GEO. WASH. L. REV. ARGUENDO 1, 8–9 (2021) (explaining that "[s]everal Circuits have tried creating frameworks clarifying when an employee is speaking pursuant to their official duties, but they do not consistently prioritize the same factors").

⁶⁴ David L. Hudson, Jr., *The Supreme Court's Worst Decision in Recent Years – Garcetti v. Ceballos, The Dred Scott Decision for Public Employees*, 47 MITCHELL HAMLINE L. REV. 375, 395 (2020).

⁶⁵ Thalia Olaya, *Public Employees' First Amendment Speech Rights in the Social Media World: #Fire or #Fire-d?*, 36 HOFSTRA LAB. & EMP. L.J. 431, 442 (2019).

⁶⁶ See *Lane v. Franks*, 573 U.S. 228, 231 (2014).

a lucrative no-work job with his agency.⁶⁷ Notwithstanding *Garcetti*, the Supreme Court unanimously found that the fired employee spoke as a citizen on a matter of public concern and was entitled to the benefit of the First Amendment.⁶⁸ Writing for the Court, Justice Sonia Sotomayor explained:

[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.⁶⁹

Lane's clarification of *Garcetti* as a narrow exception to *Pickering* is of great significance in relation to public employees' use of personal social media accounts. Virtually no government employee is assigned to post comments to a personal social media page (as opposed to the agency's own official page), so the set of social media speech that qualifies under *Garcetti* as unprotected official-duty speech should be a near-empty set. Outside the realm of social media, it is well-accepted that government employees—even those holding sensitive public-safety positions—do not lose their right to speak candidly about workplace policies or conditions, even if their speech reflects unflatteringly on the agency or its leaders.⁷⁰ The question is how faithfully courts will apply these decades-old legal principles when the instrument of choice is not Marvin Pickering's small-town newspaper but Mark Zuckerberg's Facebook platform.

C. *Is the First Amendment a "Facebook Friend?"*

Almost as soon as personal computers and internet service became a standard household feature, Congress began trying to regulate online content deemed inappropriate for children.⁷¹ These attempts almost always failed, generating a body of favorable First Amendment case law that narrowly circumscribed the government's ability to regulate the use of social media.

⁶⁷ *Id.* at 231–34.

⁶⁸ *Id.* at 237–38.

⁶⁹ *Id.* at 240.

⁷⁰ See *Hunter v. Town of Mocksville*, 789 F.3d 389, 399–400 (4th Cir. 2015) (deciding in favor of three police officers fired after contacting state attorney general and governor's office to complain about corruption within their department, which was deemed constitutionally protected citizen speech and not *Garcetti* official-duty speech); see also *Matthews v. City of New York*, 779 F.3d 167, 174 (2d Cir. 2015) (holding that police officer who complained to superiors about precinct's arrest quota was addressing a matter of public concern and consequently entitled to First Amendment protection against retaliation); *Chrzanoski v. Bianchi*, 725 F.3d 734, 740 (7th Cir. 2013) (ruling that assistant district attorney who testified about wrongdoing by supervisors was not engaged in *Garcetti* official-duty speech and was entitled to First Amendment protection).

⁷¹ Cheryl B. Preston, *The Internet and Pornography: What if Congress and the Supreme Court Had Been Comprised of Techies in 1995–1997?*, 2008 MICH. ST. L. REV. 61, 62 (2008).

In *Reno v. ACLU*, the Supreme Court struck down portions of the federal Communications Decency Act of 1996, which purported to criminalize transmitting sexually explicit online material considered harmful to minors, although perfectly legal for adults to view.⁷² The Court found the Act to be sweepingly overbroad, using undefined operative terms—“indecent” “obscene” and “patently offensive”—that could cover vast amounts of non-pornographic material that had educational value.⁷³ *Reno*, the Court’s first online-speech case, stands for the proposition that First Amendment protections apply with full force to online speech just as with books, films, magazines, or other analog modes of expression, notwithstanding the relative ease of access by child viewers.⁷⁴

The justices took their first tentative steps into the realm of social media in *Elonis v. United States*, a First Amendment challenge to the threat-speech conviction of a Pennsylvania man who claimed that his graphically violent Facebook posts about harming his estranged wife were merely jokes and amateur rap lyrics.⁷⁵ The Court ruled that the trial judge erred in failing to instruct the jury that a conviction required finding that the speaker acted with some culpable mental state.⁷⁶ The Court’s narrow decision was met with widespread disappointment for two reasons: first, the justices failed to specify what mental state must be proven, and second, the justices failed to grapple with the First Amendment implications of imprisoning people for hyperbolically violent online speech.⁷⁷

The Court addressed online speech again in *Packingham v. North Carolina*, declaring that a state cannot indefinitely prohibit released sex offenders from accessing interactive websites where minors are known to have accounts, regardless of whether the offender interacted with minors on the

⁷² *Reno v. ACLU*, 521 U.S. 844, 844 (1997).

⁷³ *Id.* at 864–65.

⁷⁴ See Rafic H. Barrage, *Reno v. American Civil Liberties Union: First Amendment Free Speech Guarantee Extended to the Internet*, 49 *MERCER L. REV.* 625, 639 (1998) (Commenting on significance of *Reno* to future judicial review of content-based regulations of online speech: “[B]y analogizing the Internet to the telephone medium and by rejecting the Government’s assertion that restrictions on speech on the Internet warrant the same standard of review applicable to the broadcast media, the Court has made a solemn proclamation: restrictions on Internet speech are subject to almost unmitigated First Amendment judicial review.”).

⁷⁵ *Elonis v. United States*, 575 U.S. 723, 728–31 (2015).

⁷⁶ *Id.* at 739–40.

⁷⁷ See Stephanie Charlin, *Clicking the “Like” Button for Recklessness: How Elonis v. United States Changed True Threats Analysis*, 49 *LOY. L.A. L. REV.* 705, 725–26 (2016) (stating that the *Elonis* Court “missed an opportunity to clarify confusion regarding the true threats statute at a time when internet related crimes, such as cyberstalking, cyberbullying, and teenage suicide are taking place at an alarming rate” (citations omitted)); see also Elizabeth M. Jaffe, *Swatting: The New Cyberbullying Frontier After Elonis v. United States*, 64 *DRAKE L. REV.* 455, 477 (2016) (calling the lack of clear guidance from the Court “troublesome”).

site.⁷⁸ Although the government had a legitimate interest in protecting children from abuse, the North Carolina law was overbroad in that it restricted access to all kinds of platforms with any type of communicative interactivity, such as job-search sites.⁷⁹ Justice Samuel Alito explained in his concurrence that the statute’s “wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child,” including online shopping sites or even the comment sections of online newspapers.⁸⁰ *Packingham* thus reinforces that, even when legislating to advance compelling public safety concerns, lawmakers must still narrowly tailor limits on online speech as they would be expected to do in any real-world forum.

Most recently, the Supreme Court in *Mahanoy Area School District v. B.L.* held that the First Amendment limits schools’ authority to regulate off-campus student speech, even if the speech is vulgar or critical of the school.⁸¹ *Mahanoy* involved an online, explicit rant by a student frustrated with her failure to make the varsity cheerleading squad, posting the tirade to a disappearing-message app, Snapchat, on a Saturday afternoon.⁸² The Court found that the school overreached by disciplining the student (“B.L.”) for off-campus speech that was within the purview of parental, not school, authority.⁸³ Although the school district argued that the ubiquity of social media speech erases the distinction between off-campus and on-campus behavior so that the same level of control should apply regardless of where the student speaks, the Court was unprepared to go so far.⁸⁴

Notably, the Supreme Court has now issued four decisions directly implicating freedom of speech online—*Reno*, *Elonis*, *Packingham*, and *Mahanoy*—and all four have gone in favor of the speaker and against the government. The sample size is small, to be sure, and the cases are context-specific. But the general drift of the Court’s first generation of online-speech jurisprudence is to err on the side of freewheeling discussion, even when the speech is of relatively minimal societal value. In a case validating the First Amendment rights of video game vendors, the Supreme Court emphasized that speech does not lose the full force of constitutional protection just because technological advances enable the speaker to reach large audiences: “[W]hat-ever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First

⁷⁸ *Packingham v. North Carolina*, 582 U.S. 98, 107–09 (2017).

⁷⁹ *Id.* at 105–07.

⁸⁰ *Id.* at 114 (Alito, J., concurring).

⁸¹ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046–47 (2021).

⁸² *Id.* at 2043.

⁸³ *Id.* at 2047.

⁸⁴ *See id.* at 2046 (recognizing that features of off-campus online speech “diminish the strength of the unique educational characteristics that might call for special First Amendment leeway” if the speech took place on school grounds during the school day).

Amendment’s command, do not vary’ when a new and different medium for communication appears.”⁸⁵ Up against this backdrop—and in light of the *NTEU* Court’s disfavor for broad prior restraints—any policy that imposes content-based prohibitions on what public employees can say online will predictably encounter skeptical review.⁸⁶

D. Social Media and Public Employment

Facebook, the most popular and enduring social networking site, became accessible to college students in 2004 and to the wider public in 2006.⁸⁷ But offensive online discourse did not originate with Mark Zuckerberg’s Harvard brainstorm. As far back as 1998, New York police officers were using relatively fledgling technology, the World Wide Web, to vent about their jobs on a discussion board (“Thee Rant”) where the discourse was raw, uncensored, and at times, hateful.⁸⁸ Still, Facebook, and the other social platforms that quickly followed—Twitter, Instagram, TikTok, and a host of others—have raised the stakes, bringing government employees’ unfiltered remarks to a potentially vast public audience.⁸⁹ It did not take long before employees began running afoul of their supervisors for what they said on their personal Facebook pages.

In 2009, a Montana police officer agreed to resign after his Facebook post—wishing for a law that would allow police to arrest people that are “stupid” provoked complaints.⁹⁰ A Massachusetts high-school teacher was fired in 2010 for writing insults about students (“germ bags”) and parents (“arrogant”) on her Facebook wall.⁹¹ A police officer in New Mexico was demoted

⁸⁵ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

⁸⁶ See Frank E. Langan, Note, *Likes and Retweets Can’t Save Your Job: Public Employee Privacy, Free Speech, and Social Media*, 15 U. ST. THOMAS L.J. 228, 241 (2018) (“The main issue facing government employers currently is whether a social media policy constitutes a ‘prior restraint’ on free speech. Prior restraints on speech are heavily disfavored at law.”).

⁸⁷ Sarah Phillips, *A Brief History of Facebook*, *GUARDIAN* (Jul. 25, 2007, 5:29 AM), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia> [<https://perma.cc/9F4K-QN97>].

⁸⁸ Arun Venugopal, *For NYPD Officers, Accusations of Offensive Comments Pre-date Facebook*, *WNYC NEWS* (Dec. 8, 2011), <https://www.wnyc.org/story/174781-blog-nypd-officers-offensive-comments-pre-date-facebook/> [<https://perma.cc/P4SH-9WNQ>].

⁸⁹ See Denise S. Smith & Carolyn R. Bates, *The Evolution of Public Employee Speech Protection in an Age of Social Media*, 22 *ATLANTIC L.J.* 1, 2 (2020) (observing that amplifying power of social media “impacts not only the interest in protecting the free speech but also the likelihood that governmental employers will attempt to block the statements in order to avoid any political controversy or backlash”).

⁹⁰ *Police Officer Resigns over Facebook Comments*, *NBC NEWS* (Sept. 4, 2009, 7:47 AM), <https://www.nbcnews.com/id/wbna32689901> [<https://perma.cc/59T4-5W3S>].

⁹¹ *Teacher Loses Job After Commenting About Students, Parents on Facebook*, *ABC NEWS* (Aug. 19, 2010, 8:28 AM), <https://abcnews.go.com/Technology/facebook-firing-teacher-loses-job-commenting-students-parents/story?id=11437248> [<https://perma.cc/6GMZ-XR>].

to a desk job in 2011 after a local television news station publicized his Facebook comment—describing his line of work as “human waste disposal”—in connection with covering his involvement in a fatal shooting.⁹² The fallout was not limited to Facebook; in a memorable 2007 case, a Virginia school district fired a teacher after students discovered his homemade YouTube videos of his after-hours job: selling prints of artwork made by pressing his paint-smearred buttocks and genitals against a canvas.⁹³

Predictably, a wave of “Facebook firing” lawsuits emerged, as public employees argued that the First Amendment protected their right to share “not-safe-for-work” images and comments while off-duty. Judges reached for the First Amendment toolkit and—finding no guidance from the Supreme Court about online speech—applied employee-speech case law developed in the offline world.⁹⁴ In one of the earliest reported “Facebook firing” cases, a federal district court in Arkansas ruled in favor of a former courthouse staffer who was asked to resign after posting comments to Facebook expressing sympathy for several co-workers fired by the newly elected clerk of courts, in what was suspected to be a politically motivated purge.⁹⁵ The court applied a straightforward *Pickering* balancing-of-interests analysis no differently than if the remarks had been made on a leaflet or in a newspaper column, finding that the former staffer was addressing a matter of public concern already attracting local news media coverage, and that the right to be free from retaliation for such speech was clearly established, disentitling the supervisor from claiming qualified immunity against a damages claim.⁹⁶

II. POLICE AGENCY SUPERVISION OVER SOCIAL MEDIA

A. Liverman and Online Speech in Policing

The Fourth Circuit has been in the vanguard of developing the law of online speech in the context of public employment, and in particular, in the law enforcement setting.⁹⁷ In an earlier and much-cited case, *Bland v.*

AH].

⁹² Erica Goode, *Police Lesson: Network Tools Have 2 Edges*, N.Y. TIMES (Apr. 7, 2011), <https://www.nytimes.com/2011/04/07/us/07police.html> [<https://perma.cc/8ZB4-FBYY>].

⁹³ *Va. School Board Fires ‘Butt-Printing’ Art Teacher*, NBC NEWS (Jan. 10, 2007, 2:21 AM), <https://www.nbcnews.com/id/wbna16557455> [<https://perma.cc/FNS6-ZCWE>].

⁹⁴ See generally Kimberly W. O’Connor & Gordon B. Schmidt, “Facebook Fired”: *Legal Standards for Social Media-Based Terminations of K-12 Public School Teachers*, 5 J. WORKPLACE RTS. 1 (2015) (discussing first wave of litigation in which public school teachers disciplined for off-hours social media activity faced discipline, with mixed results in the courts).

⁹⁵ *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283 at *2–3, *5–6 (E.D. Ark. Nov. 1, 2011).

⁹⁶ *Id.* at *2–4.

⁹⁷ See Langan, *supra* note 86, at 240 (“[T]he Fourth Circuit is on the cutting edge of First Amendment retaliation claims related to social media . . .”).

Roberts, the court decided that clicking the “like” button on a local candidate’s Facebook page was the digital equivalent of posting a yard sign, and thus an act of constitutionally protected political speech.⁹⁸ Accordingly, a Virginia sheriff’s deputy who alleged he was fired for “liking” the wrong candidate’s Facebook campaign page could bring a First Amendment claim for retaliation.⁹⁹

Bland set the stage for the court’s decision in *Liverman v. City of Petersburg*, applying the *NTEU* and *Pickering* standards to evaluate a First Amendment challenge to a police department’s employee social media policy.¹⁰⁰ In *Liverman*, the U.S. District Court for the Eastern District of Virginia assessed two officers’ First Amendment claims stemming from an exchange between the two on Facebook.¹⁰¹ Officers Liverman and Richards engaged in an exchange on Liverman’s personal Facebook page, beginning with a post in which Liverman complained about under-qualified officers receiving promotions and being named to specialty units or given positions as instructors, something that he argued posed a danger to his coworkers and the community.¹⁰²

Richards commented on the post, referencing a department official both officers were familiar with by saying, “[Y]ou know who I’m talking about . . . How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2 years experience in the street? Or less as a matter of fact.”¹⁰³ Liverman responded, saying that, “There used to be a time when you had to earn a promotion or a spot in a specialty unit . . . but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been ‘devalued.’”¹⁰⁴ Richards then commented, “Your Agency is only as good as it’s Leader(s) . . . It’s hard to ‘lead by example’ when there isn’t one . . . smh.”¹⁰⁵

When these comments were brought to the police department’s attention, Liverman and Richards were placed on probationary status on the grounds of violating the department’s social media policy, meaning they would not be eligible for promotions.¹⁰⁶ The policy under which sanctions were imposed stated, in pertinent part: “Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that

⁹⁸ *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

⁹⁹ *Id.* at 388.

¹⁰⁰ *Liverman v. City of Petersburg*, 844 F.3d 400, 406–07 (4th Cir. 2016).

¹⁰¹ Watt Lesley Black, Jr., *When Teachers Go Viral: Balancing Institutional Efficacy Against the First Amendment Rights of Public Educators in the Age of Facebook*, 82 MO. L. REV. 51, 77 (2017).

¹⁰² *Liverman v. City of Petersburg*, 106 F. Supp. 3d 744, 750–51 (E.D. Va. 2015).

¹⁰³ *Id.* at 751.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 753–54.

impacts the public[']s perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.”¹⁰⁷ Both officers brought First Amendment actions together in federal court. After putting the police department on notice of their plans to sue, Liverman and Richards were subjected to investigations of their on-duty behavior and recommended for termination.¹⁰⁸

The trial court dismissed Richards’ case entirely, finding that Richards’ comments “pertained to personal grievances and complaints about conditions of employment” rather than true matters of public concern, and therefore were unprotected.¹⁰⁹ Several of Liverman’s claims, too, were dismissed, but his core complaint—that he was punished for constitutionally protected speech—was allowed to go forward.

The court concluded that Liverman “was participating in or propelling a debate over public safety as a ‘member[] of a community most likely to have informed and definite opinions.’”¹¹⁰ The court noted that Liverman did not merely express his personal opinion, but cited an authoritative study about the importance of experience in policing, lending credence to his claim that he was contributing to public discourse about issues of officer training and safety.¹¹¹ After finding that Liverman’s speech was protected by the First Amendment as a private citizen’s speech on a matter of public concern, the court then turned to the *Pickering* balancing test.¹¹² Since the department did not have sufficient evidence to show that Liverman’s post or comments had harmed the department or had reasonable potential to cause harm, the test weighed in favor of Liverman.¹¹³ Because Liverman had an actionable challenge to the disciplinary sanctions, the court found it unnecessary to conduct a separate analysis of whether the policy was facially unconstitutional.¹¹⁴

The officers appealed, arguing both that the department’s disciplinary measures were impermissible and that the social media policy itself was unconstitutional.¹¹⁵ The Fourth Circuit agreed. Notably, the appeals court acknowledged that social media “increases the potential, in some cases exponentially, for departmental disruption” in contrast with more traditional

¹⁰⁷ *Id.* at 752 (alteration in original) (hereinafter referred to as the “negative comments policy”).

¹⁰⁸ *Id.* at 771.

¹⁰⁹ *Id.* at 759. The court also found that there were independent, non-speech-related grounds for the investigations of both Richards and Liverman. *Id.* at 771–72.

¹¹⁰ *Id.* at 758 (alteration in original) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

¹¹¹ *Id.* at 759.

¹¹² *Id.* at 760–61.

¹¹³ *Id.* at 765.

¹¹⁴ *See id.* at 756 n.14 (concluding that a facial challenge to a speech-punitive policy is effectively subsumed into the *Pickering-NTEU* analysis).

¹¹⁵ *Liverman v. City of Petersburg*, 844 F.3d 400, 414 (4th Cir. 2016).

communication methods.¹¹⁶ But the court did not treat the distinction as legally decisive.

In ruling for the officers, the Fourth Circuit stated that while the policy in question allowed officers to comment on matters of public concern “so long as the comments do not disrupt the workforce, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer” and allowed for review “on a case-by-case basis,” the policy nonetheless was overbroad in that it “strongly discourage[d] employees from posting information regarding off-duty activities” and failed to describe appropriate disciplinary action for violations.¹¹⁷ “Although regulations on social media use may appear to present novel issues,” the court wrote, there is no doubt that these policies can be adequately analyzed through the traditional *Pickering* and *NTEU* lenses that had historically been applied to employee speech in the pre-Facebook world.¹¹⁸ The opinion, by Judge J. Harvie Wilkinson, concluded with a resounding validation of the value of unfettered public employee speech in the marketplace of ideas:

Running a police department is hard work. Its mission requires capable top-down leadership and a cohesion and esprit on the part of the officers under the chief’s command. And yet the difficulty of the task and the need for appropriate disciplinary measures to perform it still does not allow police departments to wall themselves off from public scrutiny and debate. That is what happened here. The sensitivity of all the well-known issues that surround every police department make such lack of transparency an unhealthy state of affairs. The advent of social media does not provide cover for the airing of purely personal grievances, but neither can it provide a pretext for shutting off meaningful discussion of larger public issues in this new public sphere.¹¹⁹

The takeaway from *Liverman* is clear: a public employer—even a police department, where regulations on speech are relatively deferentially reviewed—may not discipline employees for off-duty speech merely because it (1) expresses a “negative” view of the employer, or (2) might lower the public’s opinion of the employer.¹²⁰ As the judges in *Liverman* recognized, such a policy would subsume core whistleblowing speech—the sort of speech that the Supreme Court recognized as constitutionally protected in *Lane*. Indeed, because of the heightened public interest in policing and the special sensitivity of law enforcement agencies’ duties, a restriction on critical or unflattering

¹¹⁶ *Id.* at 407.

¹¹⁷ *Id.* at 404.

¹¹⁸ *Id.* at 407.

¹¹⁹ *Id.* at 413–14.

¹²⁰ *See id.* at 408–09 (“We do not deny that officers’ social media use might present some potential for division within the ranks, particularly given the broad audience on Facebook. But the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers’ freedom to debate matters of public concern.”).

speech arguably is *especially* intolerable in the setting of a police force because it costs the public uniquely valuable information.¹²¹

Demonstrating that public employers still retain considerable latitude to penalize employees for speech that causes a disturbance, the Fourth Circuit subsequently sided with a state police department in an employee's challenge to his firing over derogatory comments about his supervisor that he shared on a newspaper's online comment board.¹²² The employee's posts—calling out the supervisor for what the employee believed were unprofessional social-media posts—were deemed to be mere personal grievances and not comments addressing matters of public concern.¹²³ Ironically, the First Amendment plaintiff ended up losing because of his supervisor's countervailing First Amendment rights. Because online speech during public employees' off-hours does not lose First Amendment protection merely because it reflects poor taste or is "boorish," the supervisor's speech was itself constitutionally protected—hence, the Plaintiff's criticism did not qualify as speech exposing supervisory wrongdoing.¹²⁴

During 2022, both the Ninth and Eleventh Circuits ruled in favor of employee free-speech challenges in reliance on *Liverman*. In *Hernandez v. City of Phoenix*, the Ninth Circuit ruled in favor of a First Amendment challenge by a police officer who faced disciplinary sanctions for various anti-Muslim posts and images shared to his personal Facebook page.¹²⁵ Although the officer posted while off-duty and did not identify himself as a Phoenix police officer, other posts—including some in uniform—made his affiliation readily discernible.¹²⁶ The officer sought to enjoin the police department from imposing discipline and also facially challenged the department's social media policy, which heavily regulated online speech unfavorable to the department.¹²⁷

An Arizona district court declined the Plaintiff's petition to enjoin the disciplinary action, and—distinguishing *Liverman*, somewhat unconvincingly—found the policy to be neither unduly vague nor overly broad on its face.¹²⁸ The Ninth Circuit reversed and reinstated the officer's overbreadth

¹²¹ See *id.* at 408 (declaring that "the speech prohibited by the policy might affect the public interest in any number of ways, including whether the Department is enforcing the law in an effective and diligent manner, or whether it is doing so in a way that is just and evenhanded to all concerned").

¹²² *Carey v. Throwe*, 957 F.3d 468, 468 (4th Cir. 2020).

¹²³ *Id.* at 475–76.

¹²⁴ *Id.* at 475.

¹²⁵ *Hernandez v. City of Phoenix*, 43 F.4th 966, 973 (9th Cir. 2022).

¹²⁶ *Id.*

¹²⁷ *Id.* at 980. The department's policy prohibited any social media posts "that are detrimental to the mission and functions of the Department, that undermine respect or public confidence in the Department, could cause embarrassment to the Department or City, discredit the Department or City, or undermine the goals and mission of the Department or City." *Id.*

¹²⁸ See *Hernandez v. City of Phoenix*, 482 F. Supp. 3d 902, 918–19 (D. Ariz. 2020).

claim, finding that two provisions in particular could encompass a considerable amount of constitutionally protected speech: forbidding employees from using social media in a manner “that would ‘cause embarrassment to’ or ‘discredit’ the Department,” or disclosing “information gained while in the performance of their official duties.”¹²⁹ The court observed that both prohibitions would chill societally valuable whistleblowing speech. As to the former prohibition, the court wrote that “virtually all speech that lies at the core of First Amendment protection in this area—for example, speech exposing police misconduct or corruption—could be expected to embarrass or discredit the Department in some way.”¹³⁰ As to the latter prohibition, the court cautioned:

[P]ublic employees are uniquely positioned to expose wrongdoing or corruption within their agencies precisely because they acquire information while on the job to which the public otherwise lacks access. A policy that prohibits public employees from divulging *any* information acquired while on the job would silence speech that warrants the strongest First Amendment protection in this context.¹³¹

The *Hernandez* decision built on the Ninth Circuit’s 2018 ruling in *Barone v. City of Springfield*, concluding that an Oregon police department employee could not be compelled to sign an agreement as a prerequisite for keeping her job that required her to refrain from criticizing her employer.¹³² The court deemed the agreement to be an indefensibly broad prior restraint that encompassed speech as a citizen addressing matters of public concern.¹³³

In *O’Laughlin v. Palm Beach County*, the Eleventh Circuit dealt with the case of two Florida firefighters disciplined for accusations they posted in a Facebook group about fellow firefighting union members during a contentious union election campaign.¹³⁴ The firefighters were punished for violating the fire department’s social media policy, which forbade comments adversely affecting morale, discipline, or the public’s perception of the department, or comments that “reflect negatively upon this agency or its mission.”¹³⁵ While the firefighters failed in their as-applied challenge, they prevailed in facially challenging the breadth of the policy.¹³⁶ Quoting *Liverman*, the Eleventh Circuit found that the Palm Beach County policy “suffers from the same sort of ‘astonishing breadth’” as the City of Petersburg’s (now-invalidated) policy, and would inhibit constitutionally protected speech addressing matters of

¹²⁹ *Hernandez*, 43 F.4th at 981–82.

¹³⁰ *Id.* at 981.

¹³¹ *Id.* at 982.

¹³² *Barone v. City of Springfield*, 902 F.3d 1091, 1102 (9th Cir. 2018). Specifically, the agreement forbade the employee from saying or writing “anything of a disparaging or negative manner related to the Department/Organization/City of Springfield or its Employees” or “publicly criticiz[ing] or ridicul[ing] the Department . . .” *Id.* at 1102.

¹³³ *Id.* at 1102–03.

¹³⁴ *O’Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045, 1049 (11th Cir. 2022).

¹³⁵ *Id.*

¹³⁶ *Id.* at 1054–55.

public concern.¹³⁷ The *Hernandez* and *O'Laughlin* cases, read alongside *Liverman*, reflect a growing consensus that workplace rules cannot penalize speech simply because it might diminish the agency's reputation in the eyes of the public.

Liverman represents a balanced and constitutionally sound approach to evaluating disciplinary action by law enforcement agencies. The question is whether law enforcement agencies are adhering to the *Liverman* understanding of where disciplinary authority begins and ends or overreaching into their officer's constitutionally protected off-duty speech.

B. The Dissenting View: Brown, Venable, and "Conduct Unbecoming"

Only courts in the Sixth Circuit appear to diverge from the growing consensus that government employers cannot enforce broad image-motivated disciplinary policies. The principal case in the jurisdiction, 1989's *Brown v. City of Trenton*,¹³⁸ predates the social media age. In *Brown*, four former police officers challenged disciplinary sanctions they incurred for violating a city policy against "publicly criticizing" a superior's orders or communicating any "detrimental" information outside the department.¹³⁹ The district court granted summary judgment in favor of the city and its police chief, and the Sixth Circuit affirmed.¹⁴⁰

The Plaintiffs challenged both their specific disciplinary cases as well as the policy itself, which they argued was overbroad and vague.¹⁴¹ On the as-applied challenge, the appeals court found that the officers' complaints were merely internal grievances about their own working conditions, and that the employer was entitled to substantial deference "on the matter of discouraging public dissension within its safety forces."¹⁴² On the facial challenge, the judges acknowledged that the policy, as written, could encompass all manner of constitutionally protected speech, but concluded that, if employers abuse the policy, "courts are fully capable of correcting such mistakes."¹⁴³ This rationale would later be discredited in the Supreme Court's *United States v. Stevens*, where government lawyers unsuccessfully argued that a broad prohibition against selling videos of animal abuse was constitutional despite its obvious overbreadth because prosecutors could be trusted to use discretion in applying it.¹⁴⁴ Nevertheless, *Brown* has remained influential in Sixth Circuit jurisprudence, including in how agencies' social-media policies are reviewed.

¹³⁷ *Id.* at 1055 (quoting *Liverman v. City of Petersburg*, 844 F.3d 400, 409 (4th Cir. 2016)).

¹³⁸ *Brown v. City of Trenton*, 867 F.2d 318 (6th Cir. 1989).

¹³⁹ *Id.* at 320.

¹⁴⁰ *Id.* at 325.

¹⁴¹ *Id.* at 323–24.

¹⁴² *Id.* at 322.

¹⁴³ *Id.* at 324.

¹⁴⁴ *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (stating, in facial overbreadth challenge to statute, that "the First Amendment protects against the Government; it does

In *Venable v. Metropolitan Government of Nashville*, a district court followed *Brown* and rejected a First Amendment challenge to a police department’s “conduct unbecoming” policy brought by an officer who was fired for a series of Facebook posts defending a Minnesota police officer’s controversial fatal shooting of a Black motorist.¹⁴⁵ The court acknowledged that the police department’s policy—which required that employees “at all times conduct themselves in a manner which does not bring discredit to themselves” or the police department—was a “capacious” policy.¹⁴⁶ Still, the court opined that “catchall” policies forbidding various types of misconduct or wrongdoing regularly survive constitutional challenge because policies cannot be drawn to encompass every possible scenario.¹⁴⁷ Although the policy uses the word “conduct,” the court did not grapple with the distinction between conduct and speech, nor evidence any consideration of the downside risks of interpreting the policy to apply to pure speech addressing what was, concededly, a matter of great public concern.¹⁴⁸

The Sixth Circuit’s precedent is relatively feeble up against the Fourth, Ninth and Eleventh Circuit rulings, which more directly confront the constitutional issues presented when punishing officers for speech that discredits their employer. Nevertheless, the existence of inconsistent judicial guidance augurs trouble for employees in circuits where binding precedent has yet to be established.

III. INTERROGATING THE INTERROGATORS: POLICE AGENCIES’ SOCIAL MEDIA RULEBOOKS

The regulation of public employees’ speech, particularly the speech of police department employees, raises a difficult threshold question: when, if ever, does a government agency have a legitimate interest in protecting its own reputation so that speech could become constitutionally unprotected because it reflects poorly on the agency? This is a fraught business. On one hand, the *Pickering* analysis has sometimes been interpreted to recognize damage to the agency’s reputation as a valid governmental interest that could counterbalance the employee’s interest in speaking freely, particularly where the agency is in the policing business.¹⁴⁹ In other words, if the employee’s speech

not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

¹⁴⁵ *Venable v. Metro. Gov’t of Nashville*, 430 F. Supp. 3d 350, 363 (M.D. Tenn. 2019).

¹⁴⁶ *Id.* at 362.

¹⁴⁷ *Id.* at 363.

¹⁴⁸ *See id.* at 359 (stating there was “no doubt” the officer’s Facebook posts “touched on matters of public concern”).

¹⁴⁹ *See Thaeter v. Palm Beach Cnty. Sheriff’s Off.*, 449 F.3d 1342, 1357 (11th Cir. 2006) (stating, in affirming dismissal of First Amendment claim by sheriff’s deputies fired after appearing in pornographic films, that their conduct was unprotected because it “could affect the efficiency and reputation of the [sheriff’s office] regarding the public”); *see also*

causes the public to lose confidence in the agency, that is a factor weighing against protecting the speech. But on the other hand, one might convincingly maintain that the foundational purpose of the First Amendment is to protect those who harm the government's reputation.¹⁵⁰ Professor Mary-Rose Papan-drea has persuasively argued against weighing the government's "brand" as a legitimate public purpose in a First Amendment analysis, because criticizing the government, or exposing government wrongdoing, is recognized as perhaps the highest-and-best use of speech in civil society.¹⁵¹

To assess how closely policymakers adhere to First Amendment standards, researchers with the Brechner Center for Freedom of Information at the University of Florida requested employee social media policies from the hundred largest local law enforcement agencies in the country.¹⁵² The agencies were selected based on a U.S. Justice Department census of the fifty largest police departments and fifty largest county sheriff's offices by employment.¹⁵³ Of the hundred agencies, twelve failed to respond at all and seven responded by stating that no policy exists. Accordingly, the analysis includes a total of eighty-one policies, encompassing forty-three police departments and thirty-eight sheriff's offices. The policies were scrutinized for their consistency with the *Liverman* standard,¹⁵⁴ looking for those that would inhibit a reasonable employee from criticizing the agency. The analysis concluded that thirty-two of the eighty-one policies (equal to 32 percent of the largest hundred law enforcement agencies overall, or 39.5 percent of all policies examined) cross the line of what *Liverman*, and courts applying it, have found to be a constitutionally permissible level of employer control. An additional twenty agency policies (eleven at police departments and nine at county sheriff's offices) fall

Green v. Phila. Hous. Auth., 105 F.3d 882, 888 (3d Cir. 1997) (Stating, in applying *Pickering* balancing analysis to claims of housing authority police officer disciplined over statements made in court testimony, that "the interests of the Housing Authority Police Department as employer are very significant. They include . . . protecting the Housing Authority Police Department's reputation."); *Grantham v. Trickey*, 21 F.3d 289, 295 (8th Cir. 1994) (stating, in context of correctional caseworker's retaliatory discharge claim over speech critical of his employer, that "[a] public employee's exercise of free speech rights affects the efficiency of the operation of the public service when it affects the morale of the work force and damages the program's reputation").

¹⁵⁰ See *Am. Postal Workers Union v. U.S. Postal Serv.*, 830 F.2d 294, 309 (D.C. Cir. 1987) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 273-76, 291-92 (1964)) ("Under the first amendment, as interpreted by the Supreme Court in *New York Times v. Sullivan*, the government may not punish a private citizen for damage caused to *its own* reputation.").

¹⁵¹ Mary-Rose Papan-drea, *The Government Brand*, 110 NW. U.L. REV. 1195, 1219-20 (2016).

¹⁵² For brevity, the generic term "police" will be used throughout to refer to law enforcement agencies of all kinds. If there is a distinction between city police departments and county sheriff's departments, the distinction will be explicitly noted.

¹⁵³ SHELLEY S. HYLAND & ELIZABETH DAVIS, U.S. DEP'T OF JUST., LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL (Oct. 2019); CONNOR BROOKS, U.S. DEP'T. OF JUST., SHERIFFS' OFFICES, 2016: PERSONNEL (Oct. 2019).

¹⁵⁴ *Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016).

into a gray zone; while not explicitly inhibiting employees' ability to engage in criticism, these gray-area policies may unduly constrain constitutionally protected expression by broadly requiring employees to keep all work-related information confidential. This is comparable to the confidentiality policy that the Ninth Circuit called into question in *Hernandez*.¹⁵⁵ All told, this means that at least fifty-two of the policies contain constitutionally questionable restrictions on speech addressing matters of public concern. That means 52 percent of all policies requested, and 76.5 percent of the policies actually produced by agencies, are of uncertain legality.

A. "Image-Based" Policies Forbidding Workplace Criticism

Of the policies reviewed, thirty-two were in obvious tension with the standard set forth in *Liverman* and its progeny. Of all of the policies reviewed, the San Diego Police Department's social media policy was the most clearly problematic under the *Liverman* standard, using language indistinguishable from that declared unenforceable in *Liverman*: "Negative comments on the internal operations of the Department, or specific conduct of supervisors or peers that impacts the public perception of the Department is not protected First Amendment speech, in accordance with established case law, and is prohibited."¹⁵⁶ While the San Diego policy predates the Ninth Circuit's 2022 ruling in *Hernandez*, the policy is now especially untenable in light of binding circuit-level precedent in an officer-speech case.

While San Diego-type policies that explicitly forbid "negative" comments about the employer appear rare, it is common for law enforcement agencies to enforce comparably worded rules against posts that diminish the public's esteem for the agency or its employees. For instance, the Detroit Police Department's policy says that employees are free to speak on social media with exceptions, including posts that "discredit or disrespect the Department or any Department member; or negatively affect the public perception of the Department."¹⁵⁷ In Texas, the El Paso Police Department prohibits employees from using social media to post "any material that portrays the department in a negative manner."¹⁵⁸ The Chicago Police Department's social media policy provides that officers cannot post or transmit anything that "discredit[s]" or

¹⁵⁵ See *supra* notes 125–27 and accompanying text (discussing Ninth Circuit's holding that policy prohibiting officers from sharing "information gained while in the performance of their official duties" is susceptible to facial overbreadth challenge).

¹⁵⁶ *San Diego Police Dept. Procedure, Press Release and Media Relations*, (June 13, 2018), <https://www.sandiego.gov/sites/default/files/130.pdf> [<https://perma.cc/R6Z6-C2N7>].

¹⁵⁷ DETROIT POLICE DEP'T, MANUAL DIRECTIVE NO. 102.8 DEPARTMENT INTERNET USAGE/WEB PAGES/SOCIAL NETWORKING, § 102.8(1)(a) (2020) (on file with the Nevada Law Journal).

¹⁵⁸ EL PASO POLICE DEP'T, PROCEDURES MANUAL Ch. 9, § 2, (2019) (on file with the Nevada Law Journal).

“reflect[s] poorly” on the “vision, mission, values, or goals” of CPD.¹⁵⁹ Officers in Miami, Florida, are forbidden from sharing posts that, among many other prohibitions, “negatively affect the public perception of the Department.”¹⁶⁰

In the states where the Sixth Circuit’s view applies (Michigan, Ohio, Kentucky, Tennessee), it probably is constitutional for a police department to enforce reputation-based prohibitions. But outside of the Sixth Circuit, it is doubtful that a broad proscription against harming the agency’s reputation can survive a facial constitutional challenge. Such a prohibition arguably would encompass not just whistleblowing speech about wrongdoing, but also speech about inequities in the workplace (*e.g.*, complaining that female officers are systematically underpaid).

Image-motivated policies that stop short of *Liverman*’s “negative comments” formulation are tricky to evaluate constitutionally, because the law recognizes some latitude to discipline police officers for saying or doing things that instill doubt in their fitness for duty or the agency’s ability to enforce the law without bias.¹⁶¹ On the other hand, a policy that forbids damaging the agency’s reputation could predictably encompass whistleblowing speech, since an agency’s reputation undoubtedly will suffer if serious misconduct is exposed—yet we know that exposing wrongdoing is, even within law enforcement, entitled to strong constitutional protection against retaliation.¹⁶² Indeed, some courts actually heighten the First Amendment burden for an employer to justify disciplinary action when the punishment implicates speech about wrongdoing or mismanagement within government, so that the employer must prove that the speech actually caused a substantial disruption to the workplace, not just risked a potential disruption.¹⁶³

¹⁵⁹ CHI. POLICE DEP’T, GEN’L ORDER G09-01-06, USE OF SOCIAL MEDIA OUTLETS, (Oct. 22, 2020) (on file with the Nevada Law Journal).

¹⁶⁰ MIA. POLICE DEP’T, DEPARTMENTAL ORDER 13, Ch. 4, SOCIAL MEDIA/SOCIAL NETWORKING, § 4.5.1.1, (2021) (on file with the Nevada Law Journal).

¹⁶¹ *See, e.g.*, *Locurto v. Giuliani*, 447 F.3d 159, 179 (2d Cir. 2006) (observing that “a Government employer may, in termination decisions, take into account the public’s perception of employees whose jobs necessarily bring them into extensive public contact”); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) (stating, in context of constitutional challenge to limits on campaigning activity by elected judges, that “public perception of judicial integrity is ‘a state interest of the highest order.’” (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009))).

¹⁶² *See Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988) (Ruling in favor of state police employee who filed First Amendment retaliation claim after being disciplined for speaking to the press about racial animus within the agency: “[W]e hold that when a public employee participates in an interview sought by a news reporter on a matter of public concern, the employee is engaged in the exercise of a first amendment right to freedom of speech, even though the employee may have a personal stake in the substance of the interview.”).

¹⁶³ *See Zamboni v. Stamler*, 847 F.2d 73, 78 (3d Cir. 1988) (stating, in evaluating retaliation claim by “in cases such as this involving speech on matters of significant public concern, a showing of *actual* disruption is required”).

In a grayer area, the Charlotte-Mecklenburg Police Department forbids online speech that “reflects negatively on the employee or the agency” but somewhat constrains that open-ended standard with examples of prohibited speech (“content deemed biased, aggressive, violent, inflammatory, provocative”).¹⁶⁴ While unquestionably broad, this formulation at least suggests *some* stopping point to the employer’s punitive authority.

Any policy that states, without qualification, that harming the image of the agency is a punishable disciplinary offense is inconsistent not just with *NTEU* and its progeny, but even with the less-demanding *Pickering* standard. *Pickering* requires an individualized, case-by-case balancing, so that even a reputationally harmful post might still qualify as protected speech if the speaker’s interest in addressing a matter of public concern was especially great.¹⁶⁵ Only rarely do police social media policies evidence any recognition that employees’ posts might have some detrimental impact on the agency and yet still be off-limits for authorities to penalize.

More commonly, police policies gloss over the need to balance the employee’s interests, such as the sheriff’s handbook in East Baton Rouge, Louisiana, which forbids employees from sharing posts that “negatively affect the public perception” of the agency,¹⁶⁶ without acknowledging that speech may be damaging to the agency’s image yet protected under *Pickering* and *Lane*. The East Baton Rouge policy was implicated in a free-speech dispute involving a former police union officer, Siya Creel, who was disciplined after making remarks critical of the police chief in a video interview with a blogger.¹⁶⁷ The employer argued that the interview was governed by East Baton Rouge’s social media policy, because it appeared on the YouTube social video-sharing platform.¹⁶⁸ Creel’s counsel insisted that, even if the social media policy did apply, it was vague and had been selectively enforced.¹⁶⁹ But the

¹⁶⁴ CHARLOTTE-MECKLENBURG POLICE DEP’T, DIRECTIVE NO. 800-014, SOCIAL MEDIA POLICY, (2021) (on file with the Nevada Law Journal).

¹⁶⁵ See, e.g., *Westbrook v. Teton Cnty. Sch. Dist.*, 918 F. Supp. 1475, 1486–87 (D. Wyo. 1996) (applying *Pickering* analysis and concluding that school district’s employee conduct policy, which forbade “criticism” of district personnel, was indefensibly broad and vague, encompassing constitutionally protected speech on matters of public concern).

¹⁶⁶ E. BATON ROUGE PAR. SHERIFF’S OFF., PROCEDURAL ORDER NO. Ch. 03-19, PERSONAL USE OF SOCIAL MEDIA (2013) (on file with the Nevada Law Journal).

¹⁶⁷ *Vice President of Baton Rouge Police Union Sues BRPD*, WBRZ (Dec. 4, 2020, 3:53 PM), <https://www.wbrz.com/news/vice-president-of-baton-rouge-police-union-sues-brpd/> [<https://perma.cc/8QT7-3WK9>].

¹⁶⁸ Austin Kemker, *Union Leadership Lays into BRPD Chief Murphy Paul over Firing of Officer Siya Creel*, WAFB, <https://www.wafb.com/2020/12/16/union-leadership-lays-into-brpd-chief-murphy-paul-over-firing-officer-siya-creel/> [<https://perma.cc/M78V-MGGV>] (Dec. 16, 2020, 5:04 PM).

¹⁶⁹ *Id.*

constitutionality of the policy was never adjudicated because Creel decided to resign from the police force and accepted a payout to settle his claims.¹⁷⁰

The Bibb County, Georgia, sheriff's department takes its vague social media standards a step further. Anything deemed to tarnish the department's reputation is banned, but employees are explicitly prevented from posting any criticism or praise of fellow officers as well.¹⁷¹ Limiting criticism may be justified by the department's goal of encouraging harmony among coworkers, but under this policy, officers cannot congratulate their friends on promotions or a job well done. If the rationale for allowing employers to limit off-duty speech is to further workplace morale and harmony, it seems counterintuitive to make "attaboy" grounds for punishment. By banning *all* speech about officers—favorable as well as unfavorable—the agency perhaps sought to avoid being accused of viewpoint discrimination. But by banning innocuous congratulatory comments, the agency may have exited the frying pan of viewpoint discrimination into the fire of overbreadth.

In contrast to these broadly restrictive policies, several agencies maintain narrower policies that target only a subset of especially harmful criticism. The Honolulu Police Department, for example, has a rather brief social media policy that merely incorporates the general standards of conduct for officers, offline as well as online.¹⁷² Those general standards of conduct forbid making any "false or misleading statement that maligns the character or reputation of any member of the police department."¹⁷³ By targeting only false or deceptive statements shown to cause harm, a Honolulu-type policy avoids the constitutional infirmity of broad proscriptions against criticism, leaving employees free to engage in truthful whistleblowing.

B. Unclear Policies Potentially Inhibiting Workplace Criticism

Policies that explicitly forbid criticizing the agency are, under the *Liverman* standard, the most clearly vulnerable to a facial constitutional challenge. However, many other police departments stop just short of an explicit prohibition on criticism and instead speak in terms of keeping information gained

¹⁷⁰ Beth Casserleigh, *City-Parish Pays Out More than \$175K in Settlements for Civil Lawsuits*, WBRZ (Aug. 24, 2022, 8:40 PM), <https://www.wbrz.com/news/city-parish-pays-out-more-than-175k-in-settlements-for-civil-lawsuits/> [<https://perma.cc/E5RZ-F4M5>]; Lea Skene, *After Winning Job Back in 14-Hour Appeal Hearing, Fired BRPD Union VP Resigns from Force*, ADVOCATE (Jun. 1, 2021), https://www.theadvocate.com/baton_rouge/news/crime_police/after-winning-job-back-in-14-hour-appeal-hearing-fired-brpd-union-v-p-resigns-from/article_69a953e2-c2fc-11eb-9ab6-ff104c0ca91f.html [<https://perma.cc/BB-C5-EPKR>].

¹⁷¹ See BIBB CNTY. SHERIFF'S OFF., GENERAL ORDER NO. 355, INTERNET & ONLINE SOCIAL NETWORKING/CELL PHONES (2015) (on file with Nevada Law Journal).

¹⁷² HONOLULU POLICE DEP'T, SOCIAL MEDIA POLICY (on file with Nevada law Journal).

¹⁷³ HONOLULU POLICE DEP'T, ORGANIZATION, MANAGEMENT, AND ADMINISTRATION POLICY (2016) (on file with Nevada Law Journal).

in the course of duty confidential. These policies run the risk of invalidation as overbroad, as the Ninth Circuit indicated in *Hernandez*.¹⁷⁴

To be constitutional, a social media policy must distinguish between posting sensitive information entrusted to the employee in confidence (which is unprotected speech) versus sharing information that is simply learned by virtue of being an officer (which, under the Supreme Court's *Lane* standard, is protected speech). Some policies are careful to make that distinction. For example, the Memphis Police Department furnishes examples of proscribed content-sharing that are relatively narrowly tailored, such as photos of crime scenes, victims, witnesses, or evidence, all of which could obviously jeopardize prosecutions or invade personal privacy if disclosed haphazardly.¹⁷⁵ But many others are broader, forbidding the sharing of information gained in the course of employment.¹⁷⁶ This encompasses a good deal of commentary on issues of public concern or whistleblowing, as the Supreme Court—even in its restrictive *Garcetti* opinion—has recognized the importance of letting public employees share the benefit of their inside expertise.¹⁷⁷

Of the eighty-one policies examined by the Brechner Center, thirty-three of them—41 percent of those examined—contain broad confidentiality requirements that forbid sharing work-related information. Of those thirty-three, thirteen are in cities or counties already cited above as running afoul of the *Liverman* standard. That means twenty are in cities or counties where employees are *not* forbidden from making negative comments about the workplace, but *are* forbidden from posting any information they learn on the job—which, as a practical matter, could produce the same chilling result.

The Fort Worth Police Department's policy is typical; it states that employees may not use social media to “divulge information gained by reason of their authority.”¹⁷⁸ The Cleveland Police Division's policy goes even further, stating that all “information” gained in the course of employment is the “sole

¹⁷⁴ See *Hernandez v. City of Phx.*, 43 F.4th 966, 981–82 (9th Cir. 2022) (finding that employees stated actionable overbreadth claim to police department prohibition against disclosing “information gained while in the performance of [their] official duties”).

¹⁷⁵ MEMPHIS POLICE DEP'T., POLICE AND PROCEDURES: SOCIAL MEDIA SITES/INTERNET CONTENT (2014) (on file with Nevada Law Journal).

¹⁷⁶ See, e.g., DENVER POLICE DEP'T., OPERATIONS MANUAL § 110.06 SOCIAL MEDIA (2022) (on file with Nevada Law Journal) (“Department personnel will not post, transmit, or otherwise disseminate any information to which they have access to as a result of their employment . . .”); DANE CNTY. SHERIFF'S OFF., POLICY AND PROCEDURE MANUAL, § 830.05 (2012) (on file with Nevada Law Journal) (“Department personnel shall not post, transmit, or otherwise disseminate any information to which they have access as a result of their employment without written permission from the Sheriff or his or her designee.”).

¹⁷⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 429 (2006) (“Government employees are often in the best position to know what ails the agencies for which they work.” (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994))).

¹⁷⁸ FORT WORTH POLICE DEP'T., GENERAL ORDER NO. 222.04 SOCIAL MEDIA (2023) (on file with Nevada Law Journal).

property” of the agency.¹⁷⁹ While this assertion may be true of *documents* created on the job under the “works made for hire” provision of copyright law, copyright law applies only to the actual documents and not to the facts they contain.¹⁸⁰

A logical reading of these types of policies would inhibit employees not just from whistleblowing, but sharing non-confidential information such as the percentage of supervisors who are female or black—information that the public and policymakers may find valuable in assessing whether the agency is equitably managed. Moreover, a categorical ban on sharing anything learned on the job could make it a punishable offense to publish entirely benign posts, such as warning neighbors about a rash of car thefts or burglaries.

Several police and sheriff’s departments have narrower confidentiality policies that proscribe sharing only a subset of especially sensitive job-related information. To cite one example, the Pinellas County Sheriff’s Office in Florida forbids sharing only materials gathered while responding to an incident, or “confidential” information about crime scenes, victims, or witnesses.¹⁸¹ A tailored confidentiality policy that regulates only the dissemination of genuinely sensitive official confidences—not everything gathered or learned in the course of employment—is more likely to withstand constitutional challenge.¹⁸²

C. *Policies Presenting Other Constitutional Issues*

While the primary focus of this study was to review police department policies for consistency with the *Liverman* “negative comments” standard, other common features stood out as potentially constitutionally problematic and worthy of attention. It is commonplace for law enforcement agencies to enforce prohibitions against posts that:

¹⁷⁹ CLEVELAND DIV. OF POLICE, GENERAL POLICE ORDER NO. 7.03.03 SOCIAL MEDIA POLICY AND USAGE (2020) (on file with Nevada Law Journal). A similar provision is on the books in Salt Lake City as well. See SALT LAKE CITY POLICE DEP’T, POLICY NO. 1027 EMPLOYEE SPEECH, EXPRESSION AND SOCIAL NETWORKING (2023) (on file with Nevada Law Journal) (stating that “all information gathered or obtained by employees through their Department positions is property of the Department and should be treated as private and confidential material”).

¹⁸⁰ See 17 U.S.C. § 101 (explaining that a piece of creative work “prepared by an employee within the scope of his or her employment” qualifies as a “work made for hire” in which the employer, not the worker, is presumed to hold the copyright); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) (“That there can be no valid copyright in facts is universally understood.”).

¹⁸¹ PINELLAS CNTY. SHERIFF’S OFF., GENERAL ORDER § 09-07.1 (2020) (on file with Nevada Law Journal).

¹⁸² See *Hanneman v Breier*, 528 F.2d 750, 754 (7th Cir. 1976) (finding that police department rule prohibiting officers from sharing confidential information about internal investigations was “clearly valid on its face” as a means of avoiding compromise of sensitive investigative material).

- (1) Contain images of police uniforms, vehicles, or logos;¹⁸³
- (2) Depict “reckless” or “irresponsible” behavior;¹⁸⁴ or
- (3) Contain profanity, sexual imagery, or other content deemed to be offensive.¹⁸⁵

Policies of this kind run the risk of invalidation on overbreadth grounds because they can have spillover effect deterring harmless or benevolent speech, or on the basis of vagueness, because essential terms (*e.g.*, “recklessness”) are undefined and inherently subjective.¹⁸⁶ For instance, a prohibition against social media posts of “reckless” behavior could arguably encompass bungee jumping, rock-climbing, or other “extreme” sports, imagery that a police department would have no legitimate basis to regulate. And such policies could even encompass posts *critical* of reckless behavior, such as cautionary posts reminding people not to leave pets in hot cars or drive drunk by depicting the adverse consequences of those behaviors.

Prohibitions on “irresponsible” behavior arguably reach even more broadly, since “recklessness” implies indifference to physical safety while “irresponsibility” could encompass all manner of sub-optimal personal conduct. In an illustrative policy, the Milwaukee Police Department’s operating procedures state that officers may not share posts about themselves or fellow employees “reflecting behavior that would reasonably be considered reckless or irresponsible.”¹⁸⁷ Prince George’s County, Maryland, forbids officers from sharing posts about on-duty or off-duty behavior that “reasonably could be

¹⁸³ See, *e.g.*, N.Y. POLICE DEP’T, PROCEDURE NO. 203-28 DEPARTMENT SOCIAL MEDIA ACCOUNTS AND POLICY (2018) (on file with Nevada Law Journal) (“Members of the service are prohibited from posting photographs of themselves in uniform and/or displaying official identification, patches or badges, marked/unmarked vehicles on internet sites without authorization from the Department.”). The New York policy is especially broad in applying not just to social media but to *all* “internet sites,” which by its terms would encompass, among many others, job-seeking sites such as LinkedIn. *Id.* The Supreme Court expressed disfavor for such sweeping prohibitions in *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

¹⁸⁴ See, *e.g.*, MIA. POLICE DEP’T, DEPARTMENTAL ORDER 13, Ch. 4, SOCIAL MEDIA/SOCIAL NETWORKING § 4.5.6 (2021) (on file with the Nevada Law Journal) (stating that employees may not post “speech reflecting behavior that would reasonably be considered reckless or irresponsible”).

¹⁸⁵ See, *e.g.*, JACKSONVILLE SHERIFF’S OFF., ORDER NO. 501 SOCIAL MEDIA POLICY (2023) (on file with Nevada Law Journal) (stating that officers may not post any speech “that contains obscene or sexually explicit language or images”); BROWARD CNTY. SHERIFF’S OFF., SHERIFF’S POLICY MANUAL § 15.8 SOCIAL MEDIA/SOCIAL NETWORKING POLICY (2012) (on file with Nevada Law Journal) (stating officers may not post material including “sexual” content and specifically referencing “artwork” among prohibited items).

¹⁸⁶ See, *e.g.*, Hinton v. Devine, 633 F. Supp. 1023, 1032–33 (1986) (finding that executive order requiring members of federal advisory board to undergo background check for “derogatory” information that might raise “loyalty” questions was unenforceably vague).

¹⁸⁷ MILWAUKEE POLICE DEP’T, STANDARD OPERATING PROCEDURE NO. 685.15 USE OF SOCIAL NETWORKING SITES (2022) (on file with Nevada Law Journal).

considered reckless, irresponsible, or unprofessional.”¹⁸⁸ On their face, such policies lack tailoring because they fail to differentiate between posts that would reflect unfitness for service as a police officer versus posts that simply depict personal failings or shortcomings. All manner of social media posts might be regarded as confessing irresponsible behavior yet bear no relation to fitness for duty, such as: “I can’t believe I left my spouse’s Christmas gift in a taxicab,” or “we spent our kids’ college fund on a vacation to Hawaii.” If the underlying behavior would not be grounds for discipline (*i.e.*, a police department could not discipline an officer for unwise vacation spending) then it is difficult to see how speech *disclosing* the behavior could qualify as punishable. Moreover, policies such as the Tucson Police Department’s—which forbid any post that “reflects violent, reckless, or irresponsible behavior”¹⁸⁹—could readily be interpreted to encompass whistleblowing speech that exposes violent officer misconduct.

Similarly, policies that forbid any use of profanity or references to sex invite overbreadth challenges, because they make no exception for cultural or artistic uses.¹⁹⁰ Popular culture is replete with language and imagery that might subjectively offend some viewers, yet an affinity for artwork, film, or music that contains R-rated content would not reflect unfitness to perform policing duties.¹⁹¹ As with the prohibitions against “reckless” or “irresponsible” behavior, prohibitions against profane or sexual content invite subjective and viewpoint-based application by decisionmakers, a hallmark of overbreadth.¹⁹²

Similarly, categorical prohibitions against posting any images of police emblems, vehicles, or uniforms may be susceptible to overbreadth challenge, particularly in law enforcement agencies that themselves avidly use social media to promote their successes and build community relations. If it does not endanger officer safety or otherwise undermine the employer’s interests

¹⁸⁸ PRINCE GEORGE’S CNTY. POLICE DEP’T, GENERAL ORDER MANUAL VOL. I CH. 34 SOCIAL MEDIA (2021) (on file with Nevada Law Journal).

¹⁸⁹ TUCSON POLICE DEP’T, GENERAL ORDER NO. 1340 SOCIAL MEDIA; CONDUCT AND RESPONSIBILITIES OF MEMBERS (2001) (on file with Nevada Law Journal).

¹⁹⁰ *See, e.g.*, *State v. Maynard*, 5 P.3d 1142, 1150–51 (Or. Ct. App. 2000) (en banc) (Finding the statute outlawing furnishing material to minors that depicts “sexual conduct” or “sexual excitement” was unconstitutionally overbroad, and commenting: “Whether we approve or not, minors are regularly exposed to visual images, including television programs, movies, and videos that depict sexual conduct and sexual excitement in various levels of detail.”).

¹⁹¹ As one appellate court observed in striking down a sentencing condition that forbade possession of any material depicting nudity, such a prohibition could encompass “viewing a biology textbook or purchasing an art book that contained pictures of the Venus de Milo, Michelangelo’s David, or Botticelli’s Birth of Venus, all of which depict nudity.” *United States v. Simons*, 614 F.3d 475, 483 (8th Cir. 2010).

¹⁹² *See NAACP v. Button*, 371 U.S. 415, 435 (1963) (stating that “a vague and broad statute lends itself to selective enforcement against unpopular causes”).

for the police department to post smiling officer photos on Facebook,¹⁹³ it is hard to imagine how the same photo could become punishable when shared on an officer's personal page. This type of restriction became a source of contention in Portland, Oregon, where police—pursuant to a set of policies incorporated into their union contract—are allowed to post photos of themselves in uniform only while at official police department events, but forbidden from doing so at any other time.¹⁹⁴ Many officers responded adversely when the policy was aired for public comment, with one officer stating that it is “common for officers to take ‘buddy selfies’, either with shift-mates or with officers they haven’t seen for awhile that they encounter while working. These types of posts demonstrate and encourage camaraderie and help people feel connected even when they work assignments that limit their interaction with old friends.”¹⁹⁵ As another officer succinctly put it, the policy “means an officer’s spouse couldn’t take a picture of their smiling loved one in uniform and post/share it? I find that offensive.”¹⁹⁶

Several of the collected policies present vagueness concerns because they garble the applicable legal standards or are otherwise unclear or even internally contradictory. For instance, Jersey City Police Department’s social media policy states that officers may speak as private citizens “to the degree that their speech does constitute cause for discipline.”¹⁹⁷ The policy is classically circular: speech is allowed, except for the speech that is not allowed. No further specifics are given, leaving officers to wonder whether they will be in peril if they post anything that runs afoul of a disciplinarian’s subjective judgment.

Several police policies appeared to be attempting to track employee-speech legal precedent but failed to follow the wording faithfully. For instance, the Manatee County, Florida, Sheriff’s Office borrows language from the *Garcetti* “pursuant to official duties” standard—but then goes beyond what *Garcetti* allows. According to the policy, “speech, on or off duty, made pursuant to their official duties” is deemed to be unprotected from discipline,¹⁹⁸ even though “off-duty speech made pursuant to official duties” is a

¹⁹³ See Benjamin Bliven, *Impact of Positive Stories Through Social Media*, FBI L. ENF’T BULL. (July 12, 2018), <https://leb.fbi.gov/articles/perspective/perspective-impact-of-positive-stories-through-social-media> [<https://perma.cc/C7CL-RYLR>] (encouraging law enforcement agencies to share “positive” stories on social media to build community relations, and sharing success story of how police in Wausau, Wisconsin, have attained hundreds of thousands of interactions on social media posts despite their town’s small population).

¹⁹⁴ CITY OF PORTLAND, OR. BUREAU OF POLICE, DIRECTIVE 311.40, PERSONAL USE OF SOCIAL MEDIA (2018) (on file with the Nevada Law Journal).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ CITY OF JERSEY CITY DEP’T OF HUM. RES., SOCIAL MEDIA POLICY (on file with the Nevada Law Journal).

¹⁹⁸ MANATEE CNTY. SHERIFF’S OFF., GENERAL ORDER NO. 1039: SOCIAL MEDIA § 5.1.2 (2020) (on file with the Nevada Law Journal).

logical *non sequitur*. Similarly, the Johnson County, Kansas, Sheriff's Office garbles the Supreme Court's *Pickering* standard in a circular policy that states employees may be disciplined for speech not addressing matters of public concern that "is inconsistent with an employee's position, duties, or continued employment"¹⁹⁹—in other words, it is a firing offense to say something that is a firing offense.

Some policies, while superficially reassuring, are couched in legal jargon unfamiliar to a layperson, such as the policy in effect at the Franklin County, Ohio, Sheriff's Office, which forbids making statements regarding "personal disputes about other employees with whom the employee interacts as part of the employee's duties, unless those statements rise to the level of protected concerted activity under the National Labor Relations Act or are a matter of public concern."²⁰⁰ Since the NLRA applies only to private-sector workers, and not to public-sector employees such as sheriff's deputies,²⁰¹ using the NLRA as the boundary line for when speech is protected or unprotected runs the risk of confusion.

Understandably, employers will be inclined to draft policies giving decisionmakers the maximum leeway to apply discipline. But when a policy regulating the exercise of constitutional rights provides too much latitude by using open-ended and subjective terms, both the First Amendment and the Due Process Clause of the Fourteenth Amendment can be implicated.²⁰² Vague, open-ended standards will invariably lead confused speakers to censor themselves.²⁰³ Only two of the eighty-one policies supplied by law enforcement agencies contained any explicit standards by which supervisors should assess requests by employees to post particular material on social media. Sheriffs' departments in Tulare County, California, and El Paso County, Colorado, provided identically worded policies setting forth a checklist of factors for the

¹⁹⁹ JOHNSON CNTY. SHERIFF'S OFF., POLICY 118: SOCIAL MEDIA § 118.4.2(a)(i) (2018) (on file with the Nevada Law Journal).

²⁰⁰ FRANKLIN CNTY. SHERIFF'S OFF., AR102:2 SOCIAL MEDIA § 3.3(6) (2017) (on file with the Nevada Law Journal).

²⁰¹ 29 U.S.C. § 152(2) (stating that definition of covered employer under NLRA "shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof").

²⁰² See *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (Evaluating challenge to statute restraining distribution of potentially defamatory publications as a matter of both First Amendment press freedom and due process: "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.").

²⁰³ See *Hopkins*, *supra* note 63, at 4 ("An unclear test can lead to a chilling effect on speech, causing public employees to refrain from posting job-related comments on social media sites in direct contrast to the interests of the First Amendment."); see also Gregory P. Magarian et al., *Data-Driven Constitutional Avoidance*, 104 IOWA L. REV. 1421, 1441 (2019) ("The Supreme Court has specially adapted the vagueness principle for First Amendment law to strike down speech restrictions whose lack of clarity might cause speakers to self-censor, chilling protected speech.").

sheriff or sheriff's designee to apply.²⁰⁴ But even those checklists were problematic, because they included consideration of whether the speech would “reflect unfavorably” on the agency.

In sum, police social media policies can raise constitutional red flags (or at least, yellow caution flags) for a variety of reasons, but those concerns coalesce around a single principal concern: does the policy clearly protect the ability of public employees to engage in harmless or societally beneficial speech while off-duty on personal time, or does the policy afford decisionmakers so much discretion that employees will be chilled from engaging in expression that the First Amendment protects? A few policies provided to the Brechner Center do align with prevailing constitutional standards for what government employers may permissibly regulate, which demonstrates that—with care—it is possible to craft a narrowly tailored social media policy that protects both freedom of speech and the interests of the employer that the law recognizes as legitimate.

D. Policies Protecting Employee Speech Rights

A handful of law enforcement social media policies avoid the pitfalls of unconstitutionality by providing relatively few absolute prohibitions and instead simply cautioning officers about best practices for online etiquette. The Baltimore Police Department maintains a well-tailored policy that affirmatively recognizes employees' right to use social media in their personal lives.²⁰⁵ The policy restricts disseminating information only if the information is “privileged or confidential” and obtained in the course of employment.²⁰⁶ It advises caution when divulging one's employment status with the police department, but does not forbid it.²⁰⁷ And it references the agency's whistleblower protection policy, making clear that whistleblowing is protected activity on social media.²⁰⁸

Similarly, Ohio's Columbus Police Division restricts sharing only narrowly defined categories of information, such as information or photos gathered at crime scenes, or identifiable information about fellow officers who are assigned to “covert” duties.²⁰⁹ And the policy affirmatively assures employees

²⁰⁴ EL PASO CNTY. SHERIFF'S OFF., POLICY MANUAL, POLICY 401: EMPLOYEE SOCIAL MEDIA GUIDELINES § 401.7 (2021) (on file with the Nevada Law Journal); TULARE CNTY. SHERIFF'S OFF., POLICY 220: EMPLOYEE SPEECH, EXPRESSION AND SOCIAL NETWORKING § 220.6 (2019) (on file with the Nevada Law Journal).

²⁰⁵ BALT. POLICE DEP'T, POLICY 604: SOCIAL MEDIA (2016) (on file with the Nevada Law Journal).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ COLUMBUS POLICE DIV., DIRECTIVE, NO. 10.14: SOCIAL MEDIA § III.B.1 (2019) (on file with the Nevada Law Journal).

that their supervisors will not make it a practice to search employees' social media pages unless they receive a complaint.²¹⁰

Among large county sheriff's departments, Seminole County, Florida, maintains one of the most speech-protective policies. It affirmatively assures employees that their right to use social media to discuss issues of public concern includes matters involving the sheriff's office.²¹¹ Its prohibitions cover only posts about ongoing criminal cases, or information that might compromise the employee's own status as an undercover agent.²¹² And it urges caution—but does not threaten punishment—for posts that share personally identifying data about the officer (such as date of birth) or the officer's location, for safety reasons.²¹³ These types of regulations are likely to pass muster if challenged constitutionally, because they are tailored to address concerns for the officers' own safety or the ability to effectively close cases—not just the agency's image.

IV. DRAWING THE (THIN BLUE) LINE: WHEN IS SPEECH PROPERLY PUNISHABLE?

Police officers' online speech is under intense scrutiny, rooted in concerns that some officers overzealously use force against people of color because of racial animus. In a 2019 series, the nonprofit Center for Investigative Reporting identified 400 current or former law enforcement officers who belonged to Facebook discussion groups affiliated with extremist hate groups.²¹⁴ Just a few weeks later, the nonprofit investigative news site ProPublica exposed a nonpublic Facebook group where agents of U.S. Customs and Border Patrol shared crude and offensive comments about migrants and about elected officials critical of the agency.²¹⁵ With officers' behavior under a microscope, employers understandably may be inclined to err on the side of over-regulating speech that might cast disrepute on officers or their agencies. But First Amendment law generally disfavors restraining speech in anticipation of how offended audience members may react to it, especially if the speech relates to social or political issues. Before agencies enact and enforce speech-restrictive social media rules, they should ask what objectives the rules are serving, and

²¹⁰ *Id.* § III(C).

²¹¹ SEMINOLE CNTY. SHERIFF'S OFF., GENERAL ORDER G-61: SOCIAL MEDIA § IV(A) (2017) (on file with the Nevada Law Journal).

²¹² *Id.* § IV(B), (D).

²¹³ *Id.* § IV(E).

²¹⁴ Will Carless & Michael Corey, *To Protect and Slur*, REVEAL NEWS (Jun. 14, 2019), <https://revealnews.org/article/inside-hate-groups-on-facebook-police-officers-trade-racist-memes-conspiracy-theories-and-islamophobia/> [<https://perma.cc/U6VR-TT92>].

²¹⁵ A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA (July 1, 2019, 10:55 AM), <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes> [<https://perma.cc/86KH-JLL6>].

whether those objectives are sufficiently compelling to withstand demanding First Amendment scrutiny.

A. Justifications for Restricting Officer Speech

Government employers, particularly those in the area of public safety, understandably seek to maximize control over what their employees say, both on and off the job. Some commonly offered rationales in favor of employer control include avoiding liability for discriminatory or harassing employee speech and promoting public confidence in the agency and its workforce.²¹⁶ Some rationales are more convincing than others.

Preventing danger to physical safety will always be regarded as a compelling interest that justifies some compromise of free-speech absolutism.²¹⁷ Police have access to all manner of information that, if improvidently shared, might present a safety risk to themselves or others—for instance, the identity of an officer or informant working undercover on a dangerous assignment. Employers have an obvious interest in restricting officers from sharing such sensitive confidences.²¹⁸ A narrowly tailored directive that forbids officers from disclosing only sensitive, confidential information that is likely to put safety at risk will survive any degree of First Amendment scrutiny.

But “safety” is not a talisman that magically excuses compliance with the First Amendment.²¹⁹ Regulations regularly flunk constitutional scrutiny, even when rationalized as safety measures, if they are unduly broad to accomplish the stated safety objective. For instance, courts have skeptically reviewed anti-panhandling laws, because—even though regulators claim the laws are necessary to protect safety—the laws almost always apply even to non-aggressive panhandling in low-traffic areas.²²⁰

²¹⁶ Scoville III, *supra* note 36, at 537–41.

²¹⁷ See *Reform Am. v. City of Detroit*, 37 F.4th 1138, 1157, 1159 (6th Cir. 2022) (finding that city’s decision to create separately cordoned areas for liberal and conservative protesters outside presidential debate was constitutional, because city’s interest in maintaining public safety is compelling enough to satisfy strict scrutiny); see also *Grider v. Abramson*, 180 F.3d 739, 749, 753 (6th Cir. 1999) (finding that police directive for counter-protesters at Ku Klux Klan rally to be screened for weapons was constitutionally permissible as “a necessary constraint narrowly fashioned to further a compelling governmental interest in public safety and order”).

²¹⁸ See *State v. Cooper*, 786 N.E.2d 88, 91–92 (Ohio Ct. App. 2003) (Upholding constitutionality of statute that criminalized revealing identity of undercover police officer who is engaged in active investigation: “Clearly, the government has a compelling interest in protecting the safety of undercover police officers.”).

²¹⁹ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92, 396 (1992) (striking down city ordinance that prohibited speech likely to provoke violence “on the basis of race, color, creed, religion or gender” as an impermissible viewpoint-based proscription on speech, despite its violence-prevention rationale).

²²⁰ See *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 445, 447 (2d Cir. 1981) (finding that state overreached in banning solicitation for handouts at county fair except from rented booths, because “the state failed to demonstrate the ineffectiveness of

Volunteering one's affiliation with a law enforcement organization could also expose an officer, or the officer's family, to intimidation or harassment by ill-motivated people. In 2018, a critic of U.S. Immigration and Customs Enforcement ("ICE") policies used web-scraping skills to build a database of nearly 1,600 people who identified themselves on the professional networking platform LinkedIn as employees of ICE.²²¹ While that database was quickly pulled down from social sharing platforms, it is certainly predictable in contemporary online culture that harassers may use identifying information gleaned from social media to direct abuse at police.²²²

Sparing officers from the disclosure of their affiliation with law enforcement is a problematic justification for rigid controls on the content of social media. First, officers' professional affiliation becomes public in all sorts of other ways: they testify in open court, sign their names to the citations they write, and wear name badges while on duty—or, as demonstrated by the 2018 ICE episode, they self-disclose their affiliation on publicly viewable résumé websites. Indeed, many make no secret of their law enforcement affiliation, even parking police vehicles in the driveways of their homes.²²³ Second, police departments' social media restrictions do not typically limit themselves to disclosing home contact information that could be weaponized for harassment, which raises "tailoring" questions about what problem the restrictions are meant to address. And third, narrower and less speech-restrictive alternatives may be available, such as encouraging officers with safety concerns to set their profiles to a "private" setting or to remove home addresses and telephone numbers from the publicly viewable portions of their profiles.

other less intrusive means of regulation"); *see also* *Messina v. City of Fort Lauderdale*, 546 F. Supp. 3d 1227, 1236 n.9, 1245–46 (S.D. Fla. 2021) (concluding that ordinance outlawing "aggressive panhandling" was both overbroad and underinclusive, as it applied only selectively to certain locations and certain types of requests, with no evidence of any connection to public safety); *Fernandez v. St. Louis Cnty.*, 538 F. Supp. 3d 888, 901–02 (E.D. Mo. 2021) (finding that ordinance outlawing standing in roadways to engage in specified types of solicitation was not sufficiently tailored to survive strict scrutiny, because it singled out only some forms of speech for prohibition).

²²¹ Colin Lecher, *GitHub, Medium, and Twitter Take Down Database of ICE Employee LinkedIn Accounts*, VERGE (June 19, 2018, 3:17 PM), <https://www.theverge.com/2018/6/19/17480912/github-ice-linkedin-scraping-employees> [<https://perma.cc/T9XQ-MR2F>].

²²² *See* Michael Balsamo & Colleen Long, *Police Officers' Personal Info Leaked Online*, AP (June 10, 2020, 11:15 AM), <https://apnews.com/article/death-of-george-floyd-us-news-police-politics-social-media-23a5e9d316127994ae31ad4813db3f80> [<https://perma.cc/NQN6-RFYH>] (reporting on U.S. Department of Homeland Security report cautioning that police officers' personal contact information, some of which was gathered from publicly available social media sites, was being circulated online in connection with protests against excessive police use of force).

²²³ *See* Dana Cassidy, *New Law Ensures Officers Can Park Marked Vehicles at Home*, AP (Feb. 24, 2020, 3:31 PM), <https://apnews.com/article/dda0e9acc065990db815b5f4b42d7077> [<https://perma.cc/3T96-8WVZ>] (explaining that police sought legislation allowing them to park marked vehicles at their homes regardless of neighborhood or condominium association regulations).

Beyond officer safety, police agencies have an undeniable interest in protecting their ability to successfully close cases, so officers can properly be restricted from sharing information that gives away the status of confidential ongoing investigations. Sensitive criminal investigative information is already recognized as exempt from the federal Freedom of Information Act (“FOIA”) and its state analogs.²²⁴ A policy of social media confidentiality that aligns with recognized FOIA exemptions would not result in any significant net loss of information to the public, since that information is already recognized as subject to withholding.

Other justifications for restricting officer speech present more challenging judgment calls. For example, employers may legitimately fear that officers will interfere with their ability to testify effectively if they disclose their biases, thus creating cross-examination fodder for defense attorneys. In St. Louis, for instance, a top prosecutor took the unusual step of listing officers found to have made racially offensive social media posts on her agency’s “Brady list” of law enforcement witnesses who have committed misconduct serious enough to warrant disclosure to defense attorneys.²²⁵ Several police department social media policies overtly refer to the concern of compromising officers’ efficacy as witnesses. The Milwaukee Police Department’s social media policy, for example, states that officers are not to post anything that “may adversely affect [their] credibility [as] a witness.”²²⁶ Similarly, sheriff’s

²²⁴ See A. Jay Wagner, *A Secret Police: The Lasting Impact of the 1986 FOIA Amendments*, 23 COMM. L. & POL’Y 387, 389 (2018) (stating that freedom-of-information exemptions for police investigative materials “exist in nearly all federal and state freedom of information laws and are consistently upheld in courtrooms”); see also Nicholas T. Davis, *Illuminating the Dark Corners: The New Mexico Inspection of Public Records Act’s Law Enforcement Exception*, 50 N.M.L. REV. 59, 68 (2020) (explaining how New Mexico Inspection of Public Records Act allows agencies to withhold “confidential sources, methods or information,” or certain personally identifying information about parties to a case before charges are filed (quoting N.M. STAT. ANN. § 14-2-1 (2019))); Marcus Miller, *A Public Concern: The Effect of Ohio’s Confidential Law Enforcement Investigatory Exception on Public-Records Requests of Police Body Camera Footage*, 46 CAP. UNIV. L. REV. 553, 564 n.97, 565 (2018) (describing how Ohio’s Public Records Act exempts “confidential law enforcement investigatory records” and how the state Supreme Court has interpreted the exemption (quoting OHIO REV. CODE ANN. § 149.43(A)(1))).

²²⁵ Sam Clancy, *Circuit Attorney Puts 22 Officers on Exclusion List After Accusations of Racist Facebook Posts*, KSDK, <https://www.ksdk.com/article/news/local/circuit-attorney-puts-22-officers-on-exclusion-list-after-accusations-of-racist-facebook-posts/63-c3c50127-ab2b-4ba3-a5c3-4c8a8513fd26> [https://perma.cc/7TQ7-KUAE] (June 18, 2019, 6:20 PM). The notion of a “Brady list” refers to the Supreme Court’s decision in *Brady v. Maryland*, 373 U.S. 83, 86, 90–91 (1963), in which the Court held that prosecutors may not withhold evidence material to guilt or innocence from the defense. Officers deemed to have severe breaches of conduct often end up on prosecutors’ “Brady lists”—those they try to avoid calling as witnesses due to credibility concerns.

²²⁶ MILWAUKEE CNTY. SHERIFF’S OFF., POLICY 604: BRADY MATERIAL DISCLOSURE, (2022), https://county.milwaukee.gov/files/county/sherriffs-department/Documents/Milwaukee_County_Sheriff_s_Office_Law_Enforcement_Policy_Manual.pdf [https://perma.cc/Z8ML-R5YJ].

office employees in Orange County, California, are instructed not to post anything online that could “reasonably be foreseen as having a negative impact on the credibility of the [employee] as a witness.”²²⁷ However, when the rationale for restricting officers’ online speech is to preserve a public perception of impartiality, such an argument rings with a bit of cynicism. After all, the justice system’s concern should not be for perception but for reality, working toward a police force free from prejudiced officers who allow personal biases to cloud their judgment. If an officer is exposed as a racist because of his Facebook posts, it is hard to argue that the public would be better off if the officer’s prejudices remained undetected and a closeted racist was allowed to give biased testimony.

Restrictions on speech are at times justified by the need for law enforcement agencies to maintain military-style discipline in the ranks.²²⁸ Though some government officials have more leeway in what they can and cannot post on social media, the “government’s interest in efficient public service is particularly acute” when it comes to police departments, which “have more specialized concerns” than other parts of government.²²⁹ Even the Supreme Court has recognized the specialized “need for discipline[,] esprit de corps, and uniformity” within police departments.²³⁰

But enforcing conformity has costs that are becoming increasingly apparent, as long-buried scandals in regimented organizations belatedly come to light.²³¹ In an in-depth look at the persistent problem of sexual abuse of women in the military, *The New York Times Magazine* reported in October 2021 that “nearly one in four servicewomen reports experiencing sexual assault in the military, and more than half report experiencing harassment.”²³²

²²⁷ ORANGE CNTY. SHERIFF’S DEP’T., POL’Y NO. 1058: EMPLOYEE SPEECH, EXPRESSION AND SOCIAL NETWORKING (2020), https://ocsheriff.gov/sites/ocsd/files/2021-03/Policy%201058%20Employee%20Speech%2C%20Expression%2C%20and%20Social%20Networking_0.pdf [https://perma.cc/5WBX-X35V].

²²⁸ See *Hansen v. Soldenwagner*, 19 F.3d 573, 577 (11th Cir. 1994) (“Order and morale are critical to successful police work: a police department is ‘a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers.’” (quoting *Bryson v. City of Waycross*, No. CV588-017, 1988 WL 428478 at *4 (S.D. Ga. Nov. 1, 1988))).

²²⁹ *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1301 (N.D. Ga. 2014) (quoting *Tindal v. Montgomery Cnty. Comm’n*, 32 F.3d 1535, 1540 (11th Cir. 1994)).

²³⁰ *Kelley v. Johnson*, 425 U.S. 238, 246 (1976).

²³¹ See Erin Heft, *‘Unheard’ A Former Soldier Describes Alleged Sexual Assault Firsthand*, KXXV, <https://www.kxxv.com/news/first-on-25/under-heard-a-former-soldier-describes-alleged-sexual-assault-firsthand> [https://perma.cc/4H7B-X832] (Dec. 17, 2020, 6:31 AM) (reporting that, after the April 2020 killing of a Texas-based soldier, Vanessa Guillen, who had reported sexual harassment by a colleague, allegations began surfacing of other instances of sexual misconduct at Fort Hood that had never been brought to light).

²³² Melinda Wenner Moyer, *‘A Poison in the System’: The Epidemic of Military Sexual Assault*, N.Y. TIMES <https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html> [https://perma.cc/4PX5-4C3J] (Oct. 11, 2021).

Victims of sexual abuse have turned to the public to plead their cases because internally reporting misconduct can be ineffective or, even worse, provoke retaliation.²³³ The viral #MeToo movement that swept the United States beginning in 2017 involved women using social media to share their experiences with sexual misconduct in the workplace, enlisting public support to bring about change.²³⁴ Inhibiting officers from participating in such a movement in the name of conformity and obedience may be an inadvisable tradeoff. While police officers are regarded as powerful people deputized to protect the public, officers are themselves in a vulnerable position because of the regimentation of their workplaces.²³⁵ Silencing their speech about workplace concerns carries risks that should weigh in the *NTEU/Liverman* equation.

Finally, speech restrictions may be rationalized by the importance of maintaining positive relations between law enforcement agencies and the public. If the public loses confidence that a police department will administer the law fairly, the public will begin to distrust the department. That distrust can interfere with the agency's ability to solve crimes.²³⁶ A troubling number of officers have been caught posting racist, hateful, or otherwise disparaging photos and videos on their social media accounts.²³⁷ The public may doubt whether a particular officer, or even the entire department, enforces the law

²³³ See Tony Plohetski, *A Texas National Guard Soldier Was Sexually Harassed. Then, the Military Turned on Her*, AUSTIN AM.-STATESMAN, <https://www.statesman.com/story/news/2021/05/06/texas-national-guard-sexual-harrasment-military-deployment-fort-hood-camp-mabry/7307296002/> [<https://perma.cc/3M8D-4B64>] (Dec. 10, 2021, 5:32 AM) (recounting case of Texas National Guard sergeant who was made the target of a career-threatening misconduct investigation after reporting that a superior officer repeatedly propositioned her for sexual favors).

²³⁴ See Anna North, *7 Positive Changes that Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00 AM), <https://www.vox.com/identities/2019/10/4/20852639/me-to-o-movement-sexual-harassment-law-2019> [<https://perma.cc/F6B6-T3NL>] (enumerating successes attributable to #MeToo campaign, including state prohibitions on overbroad nondisclosure agreements and expanded harassment statutes protecting previously uncovered workers).

²³⁵ See Emily R. Siegel & Simone Weichselbaum, *Major U.S. Police Departments Plagued by Officer-on-Officer Sexual Abuse and Retaliation*, NBC NEWS (Dec. 9, 2022, 3:00 AM), <https://www.nbcnews.com/news/major-us-police-departments-plagued-officer-officer-sexual-abuse-retal-rcna53020> [<https://perma.cc/P2VJ-K2YF>] (reporting on analysis of sixty harassment suits against law enforcement agencies nationwide, which suggest “systemic” problems with officers facing no consequences—or even being promoted—after being credibly accused of sexual misconduct toward colleagues).

²³⁶ See *Busby v. City of Orlando*, 931 F.2d 764, 775 (11th Cir. 1991) (recognizing that law enforcement agencies have a particular interest in maintaining “a favorable reputation with the public”).

²³⁷ See, e.g., Ben Margiott, *Police Officer Disciplined for Controversial Social Media Posts Sues City*, NBC MONT. (May 7, 2021, 11:48 AM), <https://nbcmontana.com/news/nation-world/police-officer-disciplined-for-controversial-social-media-posts-sues-city> [<https://perma.cc/UZ7M-Y8SW>] (reporting that officer who filed a First Amendment suit after being disciplined for posts critical of Antifa and the Black Lives Matter movement, which the department believed reflected badly on law enforcement).

in an unbiased manner if an officer exhibits bias on social media, even when the post does not reference the department and is made off-duty.²³⁸ This argument, too, is fraught; if officers *do* harbor racial animus that spills over into the way they do their jobs, instructing officers to (in effect) keep their racism to themselves does not address the underlying problem.

B. Arguments Against Limiting Social Media Use

Police officers, like every other person in America, have a protected right to free speech.²³⁹ At times, being a police officer is a stressful and isolating job, and officers are prone to suicide and mental health issues.²⁴⁰ Cutting off an officer from using social media to harmlessly vent displeasure with workplace stressors removes one possible route by which a suffering person might connect with support.²⁴¹

Discouraging social media use can also further isolate and distance officers from the communities they are assigned to serve. The vast majority of police officers believe that it is important to know the people, places, and local culture of the areas where they work.²⁴² Traditional police department community relations programs involve reaching out to the community by being present at local events and giving back to the neighborhood. In the age of

²³⁸ See *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1293, 1302 (N.D. Ga. 2014) (holding that disciplining an officer for a Facebook post of a photo of the Confederate flag, accompanied by the caption “It’s time for a second revolution” was constitutional, as the speech impaired the department’s relationships with the public).

²³⁹ See *Muller v. Conlisk*, 429 F.2d 901, 904 (7th Cir. 1970) (Ruling in favor of police officer who was fired after criticizing department’s ineffective internal-affairs review process in television interview and commenting: “To the extent that being a policeman is public employment with unique characteristics, the right of the employee to speak on matters concerning his employment with the full freedom of any citizen may be more or less limited. It is not, however, destroyed.”).

²⁴⁰ Petula Dvorak, *Death by Suicide Among Police Is a Quiet Epidemic. It Needs to Be Acknowledged*, WASH. POST (Aug. 9, 2021, 6:19 PM), https://www.washingtonpost.com/local/death-by-suicide-among-police-is-a-quiet-epidemic-it-needs-to-be-acknowledged/2021/08/09/c7dc2036-f941-11eb-9c0e-97e29906a970_story.html [<https://perma.cc/DEC5-44Q6>] (reporting that, as of midyear, eighty-nine officers nationwide were known to have died from suicide during 2021, as compared with eighty-four who died from shootings, accidents, or other line-of-duty causes).

²⁴¹ See Ryann Tanap, *Can Social Media Save a Life?*, NAT’L ALL. ON MENTAL ILLNESS (Sept. 29, 2017), <https://www.nami.org/Blogs/NAMI-Blog/September-2017/Can-Social-Media-Save-a-Life> [<https://perma.cc/8PT7-L2C4>] (describing features offered by social media platforms that enable users to report posts indicating self-harm ideation, connecting the users to support groups or even sending a message to the troubled speaker inviting the person to seek help).

²⁴² Rich Morin et al., *Police and the Community*, PEW RSCH. CTR. (Jan. 11, 2017), <https://www.pewresearch.org/social-trends/2017/01/11/police-and-the-community/> [<https://perma.cc/YYP7-LE9X>].

social media, many officers have taken to platforms like Facebook, Instagram, and TikTok to connect with their communities.²⁴³

Several officers on the video sharing platform TikTok have gained millions of followers by sharing lighthearted videos of themselves, their K-9 partners, and stories about their jobs.²⁴⁴ “TikTok cops” have become extremely popular on the platform, something that brings praise and criticism alike.²⁴⁵ However, even critics of this new wave of “TikTok cops” acknowledge that social media platforms are an incredibly powerful way to spread their message:

Posts tagged #HumanizingTheBadge have been viewed more than 32.7 million times, according to TikTok’s metrics. These officers are hoping that teenagers mindlessly swiping through the app will come across one of their videos . . . and that enough exposure to cops being funny and kind will get them to change their minds about law enforcement. It’s not quite community relations, but it’s definitely a new form of PR.²⁴⁶

If we assume that the vast majority of officers are *not* using social media to post racially offensive remarks, then the visibility of police officers online may be a net benefit to the public standing of, and trust for, the agency.

Overbroad regulations can also be a “trap for the unwary,” sweeping in harmless or beneficial speech along with the invidious subset of speech that the regulator is targeting. For instance, the commonplace prohibition against sharing images of police cars, uniforms, or insignias could easily be violated in a thoughtless moment by an officer who shares a harmless photo while

²⁴³ See Jonathan Shead, *Local Police Use Social Media to Build Better Relationships with Community*, SPARTAN NEWS ROOM (Dec. 18, 2017), <https://wayback.archive-it.org/org-413/20180109210111/http://news.jrn.msu.edu/2017/12/local-police-use-social-media-to-build-better-relationships-with-community/> [<https://perma.cc/DLN8-XP6>] (citing study by International Association of Chiefs of Police indicating that 89 percent of responding law enforcement agencies use social media to build positive community relations); see also Edward Burch, *Police Using Social Media to Build Community Ties*, ABC 3340 NEWS (Feb. 12, 2016 7:16 PM), <https://abc3340.com/news/local/police-using-social-media-to-build-community-ties> [<https://perma.cc/4W78-B3ZA>] (reporting that Alabama police departments are embracing Facebook, Instagram, and Twitter as means of gathering information that people might hesitate to share face-to-face).

²⁴⁴ See, e.g., Lisa (@lisafromtheroc), TIKTOK, <https://www.tiktok.com/@lisafromtheroc> [<https://perma.cc/2TE2-YXXX>]; unhinged_stability (@unhinged_stability), TIKTOK https://www.tiktok.com/@unhinged_stability [<https://perma.cc/74FP-KSRN>]; Rob_The_Opp (@rob_the_opp), TIKTOK, https://www.tiktok.com/@rob_the_opp [<https://perma.cc/368E-LZJB>].

²⁴⁵ See E.J. Dickson, *On TikTok, Cops Are Still Trying to Be the Good Guys*, ROLLING STONE (June 24, 2020), <https://www.rollingstone.com/culture/culture-features/cops-tiktok-black-lives-matter-humanizing-badge-police-1016690/> [<https://perma.cc/WN9L-TVEW>] (describing how young, telegenic officers are building six-figure followings on video-sharing platform).

²⁴⁶ Gaby Del Valle, *Cops Are Swarming TikTok to Try to Destigmatize Law Enforcement*, MEDIUM: GEN (Jan. 1, 2020), <https://gen.medium.com/cops-are-swarming-tiktok-to-try-to-destigmatize-law-enforcement-289e25b74c73> [<https://perma.cc/GP4S-VFS7>].

playing softball in a police logo shirt or doing yardwork with his police cruiser parked in the background. It could even include re-sharing images of news-worthy photos that have already been widely circulated in mass media.²⁴⁷ Making officers less visible would seem to work counter to diversification efforts to build a more inclusive police force that looks like the community.²⁴⁸

One shortcoming shared by police social media policies across the country is their “one size fits all” nature. None of the policies reviewed by Brechner Center researchers made any distinction between the free speech rights of high-ranking supervisors versus rank-and-file officers, or employees with high-profile jobs versus employees holding nonpublic desk jobs. First Amendment law, however, does consider the speaker’s rank and status as a significant, and at times decisive, factor.²⁴⁹ Speech by people in public-facing positions of authority is treated as inherently more likely to damage the agency, because audience members might reasonably regard such remarks as reflective of agency policies.²⁵⁰ Low-ranking employees arguably have a greater interest in being able to enlist public support to reform their agencies, because supervisors have authority to change their agencies’ practices internally. In the private sector, the National Labor Relations Act recognizes this

²⁴⁷ See, e.g., Ryan Schwach & Leonard Greene, *Residents Take Back Brooklyn Park Where 1-Year-Old Boy Was Killed by Gunfire*, N.Y. DAILY NEWS (Jul. 21, 2020, 7:56 PM), <https://www.nydailynews.com/2020/07/21/residents-take-back-brooklyn-park-where-1-year-old-boy-was-killed-by-gunfire/> [<https://perma.cc/CMC4-KCNY>] (news article and photos depicting New York police officers playing with children on neighborhood basketball court and doing other outreach events in community afflicted by crime).

²⁴⁸ See Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts to Recruit Diverse Officers*, USA TODAY, <https://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081/> [<https://perma.cc/S3DT-J454>] (Jan. 21, 2015, 9:07 PM) (reporting that, after racially polarizing 2014 police shooting of 18-year-old Michael Brown in Ferguson, Missouri, police departments intensified efforts to recruit a more diverse workforce reflective of the community).

²⁴⁹ See, e.g., *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998) (stating that “a public employee, who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee”); *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1302 (N.D. Ga. 2014) (Ruling against former deputy campus police chief’s First Amendment claim over racially inflammatory post on Facebook, in part because of his supervisory role: “Because Plaintiff was the Deputy Chief of Police, his conduct reflected on the Department’s reputation more significantly than the conduct of other officers.”).

²⁵⁰ See, e.g., *Palmer v. Cnty. of Anoka*, 200 F. Supp. 3d 842, 848–49 (D. Minn. 2016) (Offering diminished First Amendment protection to spokesperson for county attorney, whose job was to represent the county attorney’s office as its public face, as opposed to someone in a less-sensitive job: “After all, if a clerk or custodian posted inflammatory remarks on her personal Facebook page, it is highly unlikely that anyone would associate those remarks with [the county attorney] or that those remarks would affect the clerk’s or custodian’s ability to do her job.”); *Locurto v. Giuliani*, 447 F.3d 159, 179 (2d Cir. 2006) (stating that “a Government employer may, in termination decisions, take into account the public’s perception of employees whose jobs necessarily bring them into extensive public contact”).

distinction by offering significant free-speech protection to only non-supervisory employees, including the right to use social media to discuss dissatisfaction with working conditions.²⁵¹

Information about policing is often withheld from the public on the grounds of its unique sensitivity.²⁵² But the sensitivity of policing cuts two ways: the public has far more interest in knowing about the behavior of police officers than about ordinary civilian government employees.²⁵³ Courts have come to recognize this heightened public interest by securing the public's right to record video and audio of law enforcement officers doing their jobs in the field, notwithstanding any state statute that outlaws eavesdropping or non-consensual recording.²⁵⁴ The right to keep watch over how police do their jobs—and what type of people are being entrusted with the ultimate governmental authority to use deadly force—counsels in favor of caution in regulating officers' ability to speak. The rights of the audience, as well as the rights of the speaker, are at stake when government agencies muzzle employee speech. The Supreme Court has long recognized a constitutional right to receive and share information: “[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them. . . . More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.”²⁵⁵ Courts have explicitly recognized the value of the public's right to receive information in connection with attempts to limit police officers' discussion of workplace issues.²⁵⁶ Any policy that limits the flow of information

²⁵¹ See Frank D. LoMonte, *When a Leak Becomes a Lifeline: Reinvigorating Federal Labor Law to Protect Media Whistleblowing About Workplace Safety*, 19 SEATTLE J. SOC. JUST. 693, 698 (2021) (“In recent years, the [National Labor Relations] Board has taken quite an expansive view of what constitutes speech in preparation for group action. Even an informal remark on a Facebook page can qualify as protected speech if it concerns working conditions and invites others to join in advocating for better treatment.”).

²⁵² See Christina Koningsor, *Secrecy Creep*, 169 U. PA. L. REV. 1751, 1791–92 (2021) (asserting that local police agencies “have begun to mimic various features of the national security state,” defying public expectations of accountability with the benefit of deferential judicial review).

²⁵³ See Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 100 (2016) (arguing that, while some secret-keeping is legitimate, law enforcement agencies' lack of transparency “far exceeds anything plausibly necessary” to protect legitimate governmental interests).

²⁵⁴ See Irizarry v. Yehia, 38 F.4th 1282, 1290–92 (10th Cir. 2022) (Enumerating rulings from six federal circuits recognizing that the First Amendment protects the right to record police conducting official business in public view, and deciding: “Based on First Amendment principles and relevant precedents, we conclude there is a First Amendment right to film the police performing their duties in public.”).

²⁵⁵ Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion); see also Stanley v. Georgia, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”).

²⁵⁶ See Hunter v. Town of Mocksville, 789 F.3d 389, 396 (4th Cir. 2015) (commenting, in the context of a First Amendment retaliation case brought by North Carolina police officers who were fired after complaining to the state about corruption within their department, that “[w]ere public employees not able to speak on matters of public concern, ‘the

about policing should be scrutinized skeptically, given the public's well-recognized need to keep watch over a uniquely critical government function.

Social media policies cannot be viewed in isolation. They must be viewed in the context of the near-total control that law enforcement agencies claim over their employees, including restricting their ability to speak to the news media under penalty of discipline.²⁵⁷ And they must be viewed in light of the powerful cultural forces already at play within law enforcement agencies that promote conformity and impose powerful—if unwritten—disincentives to blow the whistle on wrongdoing.²⁵⁸ Because employers have so much power over what police officers say and do on the job, extending that plenary level of control into officers' off-hours carries real information costs for the public.

Police are being widely encouraged to build credibility through “community policing,” interacting informally with the people on their beats in hopes that the public will see police as assets rather than adversaries.²⁵⁹ The same police departments discouraging employees from even acknowledging their police employment on social media are themselves using social media to cultivate community relations, as well as solicit information to solve crimes.²⁶⁰

community would be deprived of informed opinions on important public issues’” (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004)); see also René L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1188 (1990) (Finding right to receive information rooted in Alexander Meiklejohn's theory of First Amendment as protecting informed civic participation, and commenting: “Protected public debate implies not only a right to speak, but a corollary right to receive the speech of others; *i.e.*, a right to *communicate*.”).

²⁵⁷ See Robert E. Drechsel, *The Declining First Amendment Rights of Government News Sources: How Garcetti v. Ceballos Threatens the Flow of Newsworthy Information*, 16 COMM. L. & POL'Y 129, 139 (2011) (asserting that “[i]f government employees can be disciplined without First Amendment limits for job-related speech, government employers now have another tool to discourage, intimidate and punish whistleblowers and leakers”). See generally Frank D. LoMonte & Jessica Terkovich, *You Have the Duty to Remain Silent: How Workplace Gag Rules Frustrate Police Accountability*, 55 AKRON L. REV. 1 (2022) (critiquing law enforcement agencies' news media policies and suggesting that many are unduly controlling in light of First Amendment protections afforded to public employees).

²⁵⁸ Jerome H. Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. & RSCH. 7, 8 (2002) (“[T]he unique demands that are placed on police officers, such as the threat of danger as well as scrutiny by the public, generate a tightly woven environment conducive to the development of feelings of loyalty. The refusal to report misconduct to proper authorities, or to falsely claim no knowledge of misconduct, is a common manifestation of these sentiments.”).

²⁵⁹ See U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. ASSISTANCE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION 4 (1994), <https://www.ojp.gov/pdffiles/commp.pdf> [<https://perma.cc/CS5A-5AQ7>] (Arguing that changing nature of crime and evolving public expectations require rethinking traditional policing strategies: “Police agencies must help build stronger, more self-sufficient communities—communities in which crime and disorder will not thrive.”).

²⁶⁰ See Christine B. Williams et al., *Leveraging Social Media to Achieve a Community Policing Agenda*, 35 GOV'T INFO. Q. 210, 219 (2018) (analyzing content of social media posts by five New England police departments and concluding that “police agenda setting

Imagine how much more information might flow into those departments if employees felt empowered to identify themselves as police in their online lives.

The rise of the Black Lives Matter movement has ushered in newfound public scrutiny of how police are hired, trained, and supervised. Policymakers have responded to the outcry, making information about officers' past transgressions somewhat accessible to the public.²⁶¹ Thus, it is increasingly recognized that public scrutiny and discussion of issues within law enforcement agencies is societally beneficial.²⁶²

If police officers cannot speak candidly about their work, the public may be left with an incomplete or slanted version of events. Law enforcement agencies are increasingly relying on hired public-relations agencies to burnish their reputations, even when that means providing incomplete or misleading information.²⁶³ Police authorities have been repeatedly caught promulgating sugarcoated narratives about questionable (or even outright criminal) instances of officers' use of force, issuing press statements that omit or misrepresent critical facts.²⁶⁴ Police unions, too, have been caught peddling exaggerated narratives to advance their agenda, such as falsely claiming that law enforcement agencies were "defunded" by reformers or that vaccination mandates were causing mass officer resignations.²⁶⁵ In other words, leaving the

through social media affords opportunities for departments wishing to expand their reach and interaction with their community networks").

²⁶¹ See Kallie Cox & William H. Freivogel, *Police Misconduct Records Secret, Difficult to Access*, AP (May 12, 2021, 7:28 AM), <https://apnews.com/article/us-news-police-reform-police-government-and-politics-fa6cbd7e017b85aa715e23465a90abbe> [<https://perma.cc/5Q5R-8HCM>] (reporting that, in recent years, seven states have passed laws enabling the public to view once-confidential police personnel files, though in many states, records of officer misconduct remain elusive).

²⁶² See Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 546 (2011) ("Both transparency and accountability are necessary to uphold the rights of people under criminal justice control and to ensure that the criminal justice system evolves in ways that genuinely promote the public interest.").

²⁶³ See Scott Morris, *The Vacaville PR Firm Influencing Police Narratives Across California*, VALLEJO SUN (Nov. 30, 2021), <https://www.vallejosun.com/the-vacaville-pr-firm-influencing-police-narratives-across-california/> [<https://perma.cc/TA4Z-2NR8>] (describing how twenty-one law enforcement agencies across California have hired "crisis communications" firm run by former television journalist who dispenses advice "designed to help police agencies evade transparency and accountability and to deflect scrutiny by traditional news media").

²⁶⁴ Ashley Parker & Justine McDaniel, *From Freddie Gray to Tyre Nichols, Early Police Claims Often Misleading*, WASH. POST (Feb. 17, 2023, 5:00 AM), <https://www.washingtonpost.com/nation/2023/02/17/police-shootings-false-misleading/> [<https://perma.cc/Q4VS-7ESF>].

²⁶⁵ See Jerry Iannelli, *Police Disinformation Is Still Disinformation*, APPEAL (Nov. 30, 2021), <https://theappeal.org/police-disinformation-newsletter/> [<https://perma.cc/EX8R-AW3J>] (furnishing examples from Oakland and Seattle in which children's deaths were falsely blamed on purported diminution in police ranks).

public to rely solely on official accounts from authority figures means that the picture will be deceptively incomplete. It is an imperfect solution to rely on rank-and-file officers to call out their own agencies, but as the courts have often recognized, insiders can and do furnish candid information of public importance when they are assured that the law will have their backs.

In deciding what constitutes a punishable disruption on social media, policymakers must be mindful of the unique qualities of online speech that invite overzealous punishment. Social media speech is prone to hyperbole, inside jokes, and other figurative language or images that can seem alarming without context.²⁶⁶ Facebook and X, formerly known as Twitter, are awash in overwrought expressions of outrage—real or feigned—over speakers' perceived affronts or misjudgments.²⁶⁷ If simply provoking condemnation from a large number of social media account holders is enough to cause online speech to become punishably “disruptive,” then almost any post can qualify as punishable. For this reason, some advocates have called for a heightened legal burden—proof of an actual or imminent disruption, not just the possibility of disruption—before a government decision maker can punish an employee for online speech.²⁶⁸

²⁶⁶ See, e.g., Mark Keierleber, *A Toy Gun, a Snapchat Post, and an Arrest*, 74 MILLION (Dec. 5, 2018), <https://www.the74million.org/article/a-toy-gun-a-snapchat-post-and-an-arrest/> [<https://perma.cc/PR9M-M75K>] (recounting story of Connecticut teenager who was suspended from school and arrested because he posted a photo to his personal Snapchat account of a toy BB gun that carried the manufacturer's logo, “Have a nice day,” which school authorities perceived as threatening).

²⁶⁷ See, e.g., Peter Suci, *Actress Gal Gadot Created Social Media Firestorm*, FORBES (May 12, 2021, 1:31 PM), <https://www.forbes.com/sites/petersuci/2021/05/12/actress-gal-gadot-created-social-media-firestorm/?sh=12d81c1469bc> [<https://perma.cc/U7MD-Y55N>] (reporting that movie star Gal Gadot “created a firestorm” on Twitter after sharing a heartfelt wish for peace in the Middle East, which drew more than 41,000 responses, many from critics denouncing her as a “Zionist” and calling on her movie studio to fire her); Michael Grothaus, *Twitter Is Working on ‘Unmentions’ to Let You Silence Bullies and Outrage Mobs*, FAST CO. (Jun. 15, 2021), <https://www.fastcompany.com/90647254/twitter-is-working-on-unmentions-to-let-you-silence-bullies-and-outrage-mobs> [<https://perma.cc/N4LF-C996>] (Previewing Twitter feature that would allow users to avoid seeing hostile posts by preventing others from “mentioning” their Twitter screen names: “Sometimes, Twitter is like stepping into a war zone when all you showed up for was a stroll through the park.”); Alex Abad-Santos, *2015: A Year of Fake Outrage and Backlash that Made Us Feel Better*, VOX (Dec. 23, 2015, 2:00 PM), <https://www.vox.com/2015/12/23/10659910/2015-outrage> [<https://perma.cc/9S89-TVE7>] (describing instances of “reverse outrage” on social media over issues as insignificant as Starbucks' failure to include Christmas iconography on the company's holiday-themed coffee cups, in which people provoked by the initial expression of outrage end up amplifying their opponents by recirculating their posts).

²⁶⁸ See Hopkins, *supra* note 63, at 25–26 (explaining that circuits are split over what level of disruption an employer must prove to justify punishing speech, but advocating for the more demanding “actual disruption” test, which provides a clear evidentiary standard and “prevents the chilling effect caused by a potential disruption standard, allowing public employees to speak more openly as the First Amendment intended”); see also Smith & Bates, *supra* note 89, at 30–31 (arguing that courts have erred in empowering employers

RECOMMENDATIONS AND CONCLUSION

In a deep exploration of the pervasive problem of retaliation against police whistleblowers, journalists with *USA Today* documented that officers who report wrongdoing within the police force routinely face ostracism, harassment, and firing.²⁶⁹ This creates an environment where “there is no wrongdoing so egregious or clear cut that a whistleblower can feel safe in bringing it to light.”²⁷⁰ The reporters specifically focused on the ineffectiveness of the internal-affairs complaint process, which can be weaponized to penalize the very people it is supposed to protect: whistleblowers have found themselves targeted by internal investigators merely for calling attention to suspected police misconduct.²⁷¹

It is widely documented that U.S. law enforcement agencies, when left to process complaints internally, reflexively side with the accused wrongdoer, in part, because influential police unions have made certain that the process is built to give officers a prohibitive home-field advantage.²⁷² Perhaps no more disturbing example exists than the case of former Minneapolis officer Derek Chauvin, who—before he was convicted of murdering George Floyd during a stop for a petty offense—had accumulated a record of twenty-two complaints or internal investigations of misconduct, including excessive use of force, with no indication of any significant disciplinary consequences.²⁷³ The ability to call public attention to concerns within law enforcement is especially valuable because reporting the concerns up the chain of command does not reliably produce results.

Officers’ online speech can damage the employer’s reputation in several categorically different ways. First, the speech might betray that the officer has misused policing authority (or has the predisposition to do so) or has engaged in other antisocial behavior suggesting unfitness for duty. This category of speech is punishable without offending the First Amendment, because the

to impose punishment on a mere showing of potential disruption, and that the properly speech-protective balance should require proof of a “high likelihood of disruption”).

²⁶⁹ Gina Barton et al., *Dead Rats, Death Threats, Destroyed Careers. How Law Enforcement Punishes Its Whistleblowers*, USA TODAY, <https://www.usatoday.com/restricted/?return=https%3A%2F%2Fwww.usatoday.com%2Fin-depth%2Fstory-series%2F2021%2F11%2F09%2Fcops-report-excessive-force-risk-jobs%2F8514211002%2F> [<https://perma.cc/J68R-W78W>] (Nov. 15, 2021, 4:26 PM).

²⁷⁰ *Id.*

²⁷¹ *See id.* (reporting on instances in which “department leaders twisted the process, opening inquiries against whistleblowers and even their own internal investigators”).

²⁷² Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, NEW YORKER (June 18, 2020), <https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses> [<https://perma.cc/BLH3-2XWZ>].

²⁷³ Jamiles Lartey & Abbie VanSickle, *‘That Could Have Been Me’: The People Derek Chauvin Choked Before George Floyd*, MPR NEWS (Feb. 5, 2021, 1:39 PM), <https://www.mprnews.org/story/2021/02/05/that-could-have-been-me-the-people-derek-chauvin-choke-d-before-george-floyd> [<https://perma.cc/UX7Z-EZ5M>].

punishment is directed at the unprotected underlying conduct and not the speech. Second, the speech might expose questionable policies or practices within the police department. This, unmistakably, is constitutionally protected whistleblowing under the Supreme Court's *Lane v. Franks*.²⁷⁴ Then, there is speech in the gray zone between these easy judgment calls. Speech may provoke backlash because it espouses an unpopular position on a divisive issue, or because it offends prudish sensibilities (for instance, quoting profane lyrics from a popular rap song, or sharing a movie clip that contains nudity). Speech in this uncertain middle category cannot be wholly banned because it encompasses highly protected political speech. But it can be grounds for individualized disciplinary action under a *Pickering* analysis (for instance, if a police supervisor's proclivity for sharing lyrics with racially offensive language is provoking fights in the workplace).

First Amendment jurisprudence advises that government agencies should avoid restricting speech or penalizing speakers if effective alternatives exist to achieve the government's legitimate interests.²⁷⁵ If the government's concern is that some subset of police officers exhibit prejudice that taints their policing, which becomes visible as a result of social media speech, it is the behavior—not the speech—that the Constitution counsels the government to target.

Government employers, like their private-sector counterparts, have legitimate interests in distancing themselves from employees' personal opinions, especially when the opinions are politically controversial or inflammatory.²⁷⁶ This does not mean, however, that a government employer can legitimately keep an employee from speaking, or declare anything work-related off-limits for discussion. The First Amendment always prefers the remedy of counter-speech over silencing speech, and a police department is free to use its own access to media to disavow individual employees' distasteful political opinions. Even if some audience members may jump to the unreasonable conclusion that an entire police department is untrustworthy because one employee used poor judgment on social media, the First Amendment does not concern itself with how the most delicate-eared listener might overreact.²⁷⁷

²⁷⁴ See *Lane v. Franks*, 573 U.S. 228, 238, 241 (2014); see also *Zamboni v. Stamler*, 847 F.2d 73, 77 (3d Cir. 1988) (recognizing, in First Amendment challenge brought by detective in district attorney's office, that "public employees' criticism of the internal operations of their places of public employment is a matter of public concern").

²⁷⁵ See *Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020) (explaining that, to demonstrate that a law is sufficiently tailored to survive First Amendment scrutiny, "the government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest").

²⁷⁶ *Scoville III*, *supra* note 36, at 480.

²⁷⁷ For instance, whether speech rises to the level of a constitutionally unprotected "true threat" is not judged by whether some listener subjectively perceived it as threatening, but

Because social media is so effective at reaching a wide audience and provoking public reaction, government policymakers have at times imposed uniquely restrictive regulations on employees' use of social media as opposed to other forms of communication.²⁷⁸ For instance, the University of Kansas' governing board enacted a social media-specific prohibition against speech that "adversely affects the university's ability to efficiently provide services," which one legislative supporter explicitly acknowledged as a maneuver to protect the university's image.²⁷⁹ At times, police departments have even acknowledged that they scrutinize online speech more rigorously than they might scrutinize a letter-to-the-editor of a newspaper because online speech is perceived as especially dangerous. The police department in Baltimore County, Maryland, made this explicit in a 2019 directive regulating social media use: "The nature of the Internet and social media increases the potential, in some cases exponentially, that a member's speech may result in departmental disruption."²⁸⁰

But the figurative and freewheeling nature of social media speech counsels in favor of more, not less, restraint by authorities. As one judge observed in adjudicating a defamation claim based on a single Twitter post alleging that the Plaintiff "spread Russian bots" online: "If the Internet is akin to the Wild West, as many have suggested, Twitter is, perhaps, the shooting gallery, where verbal gunslingers engage in prolonged hyperbolic crossfire."²⁸¹ Social media is susceptible to cultural and contextual misreadings in a way that Marvin Pickering's letter to the local newspaper was not.²⁸² Courts have struggled, for instance, to decide how much importance to attach to emoji icons or slang acronyms ("LOL," "JK") that accompany digital speech and may

by a standard of reasonableness—although there is some debate whether reasonableness is gauged from the vantage point of the speaker or the recipient. *See Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 623 (8th Cir. 2002) (acknowledging split of authority on this issue but electing to apply a reasonable listener standard).

²⁷⁸ *See* Smith & Bates, *supra* note 89, at 8 ("Social media amplifies speech made by its users. When a public employee's message is amplified by a social media's platform, the amplification of the speech increases not only the interest in protecting the free speech but also the likelihood that the employee's speech will disrupt the government employer's interest in efficiency.").

²⁷⁹ *See* Ben Unglesbee, *University Employees: New Social Media Policy Is Broad, Vague and "Chilling,"* LAWRENCE J.-WORLD (Dec. 19, 2013, 6:04 PM), <https://www2.ljworld.com/news/2013/dec/19/university-employees-and-officials-consider/> [<https://perma.cc/D5YH-WZXF>].

²⁸⁰ BALT. CNTY. POLICE DEP'T, SPECIAL ORDER NO. 2019-04: PERSONAL USE OF THE INTERNET AND SOCIAL MEDIA 3 (2019) (on file with the Nevada Law Journal).

²⁸¹ *Ganske v. Mensch*, 480 F. Supp. 3d 542, 542, 545 (S.D.N.Y. 2020).

²⁸² *See* Fernando L. Diaz, *Trolling & the First Amendment: Protecting Internet Speech in the Era of Cyberbullies & Internet Defamation*, 2016 U. ILL. J.L. TECH. & POL'Y 135, 146 (2016) (giving examples of rap lyrics, inside jokes, and other online speech that defies easy analysis under an objective standard focusing on how a reasonable listener would perceive the speech).

modify how it is intended or understood.²⁸³ For this reason, commentators have widely urged courts and policymakers to consider the distinctive qualities of social media in crafting extra-protective standards to protect employees against disciplinary misfires for innocent misunderstandings or “Twitter mob” overreactions.²⁸⁴

In crafting an optimal policy that walks the tightrope between protecting employers’ legitimate interests and adhering to the First Amendment principles recognized in *Liverman*, a public employer must be mindful of several guideposts. First, because online speech gets no less constitutional protection than speech in other mediums, public employers should ask themselves: would we—or could we—prohibit this speech if it were in a letter-to-the-editor, or face-to-face to coworkers in the breakroom? If the answer is “no,” then the choice is clear: speech cannot be singled out for prohibition merely because it is electronically disseminated. As one commentator has observed, “[t]he heightened visibility of social media, anonymity of internet users, and collective outrage surrounding unpopular viewpoints foster an environment where employers react to the slightest controversy.”²⁸⁵ But whatever the temptation to treat social-media speech as subject to uniquely rigorous regulation, such a view finds no support in the Supreme Court’s First Amendment jurisprudence.²⁸⁶

Second, in crafting any regulation that implicates speech diminishing public confidence in the agency, there must be broad latitude for whistleblowing speech and for speech addressing matters of legitimate political controversy, even if a byproduct of that speech is that some members of the

²⁸³ Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1227, 1247–54 (2018) (explaining that emoji symbols are purposefully malleable and may carry multiple meanings, and can be interpreted differently across different cultures, making them susceptible to judicial misinterpretation).

²⁸⁴ See Hopkins, *supra* note 63, at 24 (“The need for a clear standard is even greater in social media cases due to the wide reach of speech communicated over social media. . . . With a larger audience, it is easier to present evidence of a potential disruption because the speech reaches more people and simply has a higher likelihood of affecting workplace relationships and operations.”); see also Smith & Bates, *supra* note 89, at 4 (Arguing that “it is imperative that the courts adopt a relaxed standard” for evaluating First Amendment cases in the social media context: “The only way for courts to protect the precarious balance between the employees and their government employers is to require the government employers to meet a heightened evidentiary burden” of demonstrating a high likelihood of actual disruption to the workplace.); Olaya, *supra* note 65, at 478 (Stating that, if employees are subject to being punished purely because of the “potential” that their online speech might provoke some level of workplace disruption, such a standard would “increase the likelihood that an employee’s First Amendment rights would be disregarded due to the difficulty in ascertaining the true meaning of the expression and the sender’s intent.”).

²⁸⁵ Alexis Martinez, Comment, *The Right to Be an Asshole: The Need for Increased First Amendment Public Employment Protections in the Age of Social Media*, 27 AM. U.J. GENDER SOC. POL’Y & L. 285, 297–98 (2019).

²⁸⁶ See *supra* note 74 and accompanying text.

public—or even some insiders within the agency—are provoked to complain. Courts have long recognized the corrosive nature of a “heckler’s veto” that empowers the most thin-skinned, easily offended person in the audience to dictate what everyone else may hear.²⁸⁷ This is exponentially truer in the realm of online speech, when the “audience” potentially is worldwide. With 3 billion monthly worldwide users on Facebook,²⁸⁸ it is almost inconceivable that any political statement will *not* offend someone, somewhere. The test of whether a statement loses First Amendment protection cannot be that it prompted some fleeting adverse online reaction, since social media by its nature is built to amplify and reward expressions of outrage, however overblown they may be.²⁸⁹ It also must be observed that, within police departments in particular, whistleblowers may be unpopular. A person who exposes wrongdoing or advocates for reforms in policing predictably may be perceived by fellow officers as untrustworthy.²⁹⁰ “Maintaining harmony” cannot become synonymous with “expressing majoritarian opinions that no other officers disagree with,” for that standard would encompass a vast range of social and political commentary.

Finally, it is valuable for public employers to recognize that overreaction to social media speech can itself amplify whatever controversy the speech generates and prove more disruptive than the speech itself. In an illustrative case, the Metro Nashville Police Department fired a formerly well-regarded

²⁸⁷ See Brett G. Johnson, *The Heckler’s Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL’Y 175, 214 (2016) (explaining that “the heckler’s veto principle urges authorities to follow an ethic of restraint when faced with a situation where speech may provoke harmful reactions from a hostile audience. This ethic of restraint affords ‘breathing space’ to speech that is either unpopular or offensive.” (citation omitted)).

²⁸⁸ Issie Lapowsky, *Facebook Earnings: 3 Billion Users and Counting*, PROTOCOL (Apr. 29, 2020), <https://www.protocol.com/tech-earnings-q1-2020-protocol-guide-facebook> [<https://perma.cc/QM6W-AKUS>].

²⁸⁹ See Connie Lin, *Yale Researchers Say Social Media’s Outrage Machine Has the Biggest Influence on Moderate Groups*, FAST CO. (Aug. 13, 2021), <https://www.fastcompany.com/90665826/yale-researchers-say-social-medias-outrage-machine-has-the-biggest-influence-on-moderate-groups> [<https://perma.cc/RBK7-5LMG>] (describing findings of Yale University study of Facebook and Twitter activity that concluded the sites’ algorithms favored posts expressing outrage, which could incentivize users to continue posting more such expressions in a “feedback loop[]” of reinforcement).

²⁹⁰ For an illustrative case, see *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013). In *Durham*, the Fourth Circuit upheld a jury award in favor of a fired sheriff’s deputy who, the evidence showed, was pressured to rewrite his honest account of using force against a fleeing suspect who was injured and hospitalized. *Id.* at 294. The evidence showed that the deputy was threatened with criminal charges if he did not revise his written reports, including references to how superiors tried to get him to change his initial report, which the deputy believed was an attempt to create a false paper trail to insulate the sheriff’s department against a complaint of excessive force. *Id.* at 295–96. After the deputy filed an internal-affairs complaint over how his superiors treated him, he was immediately demoted, and after he went public with his concerns by writing to the press and various elected officials, he was fired. *Id.* at 296–97.

police officer who, in what he described as a failed inside joke among friends, made an offensive remark on Facebook seemingly siding with a Minnesota police officer who fatally shot motorist Philando Castile during a traffic stop.²⁹¹ Although the remark undoubtedly was ill-considered and reflected poor judgment, it generated a grand total of one complaint—until the police department publicly announced it was investigating the officer, *after* which a disruptive level of internal and external outcry resulted.²⁹² Experiences of this kind underscore the importance of taking a measured response to online controversies. Judges, too, must be vigilant in adjudicating First Amendment claims to distinguish the disruption fairly attributable to the speaker versus those resulting from the employer’s own reaction.²⁹³

Is it likely that, released from restrictive workplace rules, officers will avidly use social media to expose police misconduct? Realistically, that expects too much. But officers might well use social networking pages in other ways beneficial to themselves or to society if not constrained by rules against creating a “negative” public impression. People can, and do, reach out for mental health help through social media, letting friends and family know they are struggling with stress.²⁹⁴ Postings about the adversity that police officers experience on the job may contribute to public understanding and even generate support for suicide-prevention programs and other support services. But if complaining about being overworked is considered a punishable offense, because it creates a “negative” image of the police department, then those conversations will never take place.

Public employers might instructively take a lesson from the private sector, and the way the National Labor Relations Board has recognized social media as a potentially powerful tool for employees to improve their own working conditions, both by organizing amongst themselves and by enlisting support from the public. The NLRB has consistently told employers in the private sector that they may not forbid employees from discussing work-related matters on social media or punish them for airing workplace complaints, because the National Labor Relations Act protects the right to organize.²⁹⁵

²⁹¹ Scoville III, *supra* note 36, at 483.

²⁹² *See id.* at 508 (stating that only “a handful” of people saw the Facebook comment before the police department called attention to it, and that the police department “disrupted its own work” by publicizing the comments).

²⁹³ *See id.* at 545 (noting that, in the Metro Nashville Police Department case, the police department’s decision to issue a public press release “prompted the very news coverage that purportedly created a workplace disruption that could be used to defend against a public employment retaliation claim”).

²⁹⁴ Jan Hoffman, *Trying to Find a Cry of Desperation Amid the Facebook Drama*, N.Y. TIMES (Feb. 23, 2012), <https://www.nytimes.com/2012/02/24/us/facebook-posts-can-offer-clues-of-depression.html> [<https://perma.cc/PTK7-W4EX>] (Explaining that Facebook posts “can serve as signs of depression and an early warning system for timely intervention.”).

²⁹⁵ *See* DirectTV U.S. DirectTV Holdings, L.L.C., 359 N.L.R.B. 545, 550 (2013) (directing employer to revise overly broad employee-speech policy that prohibited online posts containing any “company information that is not already disclosed as a public record,” which

Free-speech rights logically cannot be narrower in the government sector than they are in private industry. If there is a legally protected right to use social media to complain about workplace policies and practices in the private sector, there must necessarily be at least as much freedom for public employees, including those in uniform, because of the public's acute interest in seeing that government agencies operate equitably and effectively.

There is a legally decisive difference between speech that reflects poorly on the agency because it indicates that the speaker is unfit to discharge public duties, versus speech that reflects poorly on the agency because it calls attention to the agency's shortcomings. The former is legitimately and legally punishable (and, indeed, arguably is not about the content of the speech so much as it is about the underlying character flaws that the speech might expose).²⁹⁶ The latter, as underscored by the Supreme Court in *Lane*, is core constitutionally protected speech. If a workplace policy fails to distinguish intelligibly between the former and the latter, then it is almost certainly unconstitutionally overbroad.

It is possible to construct a narrowly tailored policy that restricts only well-defined subcategories of speech that would reasonably be expected to compromise the agency's ability to function, while also leaving elbow room for commentary on issues of public concern. For instance, in Maryland's Montgomery County, a handbook for employees' off-duty use of social media cautions against "posting or publishing statements, opinions or information that might reasonably be interpreted as discriminatory, harassing, defamatory, racially or ethnically derogatory, or sexually violent when such statements, opinions or information, may place the Department in disrepute or negatively impact the ability of the Department in carrying out its mission."²⁹⁷ This policy is relatively narrow because it contains two predicates for online speech to constitute a punishable violation: the speech must both fall into one of the identified categories and foreseeably have an adverse impact on the employer. The trigger for punishability is not (as in the *Liverman* line of cases) speech that merely causes people to think less of the agency, but speech

could encompass sharing complaints about working conditions); *see also* *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 368, 368, 374 (2012) (ordering reinstatement of workers at nonprofit organization who used Facebook to share complaints about perceived managerial unfairness, in violation of employer's "zero tolerance" policy for harassment of co-workers); *Costco Wholesale Corp.*, 358 N.L.R.B. 1100, 1100 (2012) (concluding that Costco's employee-speech policy, which included prohibitions against electronically sharing comments that "damage the company or any person's reputation," was unlawfully broad, as it would chill NLRA-protected organizing).

²⁹⁶ *See, e.g.*, *Locurto v. Giuliani*, 447 F.3d 159, 183 (2d Cir. 2006) (Finding that firefighters and police officer who rode on parade float in offensive costumes stereotypically mocking African-Americans could lawfully be fired, because Black constituents of the agencies could legitimately suspect that the employees would render service in a discriminatory manner: "The First Amendment does not require a Government employer to sit idly by while its employees insult those they are hired to serve and protect.").

²⁹⁷ *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 337 (4th Cir. 2017).

that undermines public confidence *because* it falls within specified categories of low-value speech.

The increasing creep of government regulation into employees' off-duty speech pushes Professor Papandrea's concern to the front burner of public life: should we care about the reputation of police departments and other government agencies enough to weigh their reputational interests as a potentially decisive counterweight to freedom of speech?²⁹⁸ The current judicial response to that question is unsatisfying, lacking nuance about the ways in which employees' speech can be both reputationally damaging but also civically valuable.

As "speech" increasingly comes to include "online speech," the courts' analysis should evolve accordingly. While it might make sense to weigh the dissenting views of audience members in a First Amendment analysis when the "audience" consists of newspaper subscribers in Joliet, Illinois (where schoolteacher Marvin Pickering published his momentous opinion letter), it makes less sense to hold speakers responsible for how waves of remote and unforeseen audience members on social media might overreact in an echo chamber of outrage.²⁹⁹ If merely provoking audience members to express a diminished opinion of the government agency is enough to denude a speaker of First Amendment protection, there will be very little room for freedom of speech on social media—and none at all for employee whistleblowing—because *some* adverse reaction from *some* corner of the internet is almost a given.

In cases such as *Liverman*, the courts are increasingly recognizing that the First Amendment constrains government authorities in limiting how police, and all public employees, communicate with the public through social media. Given the growing consensus with post-*Liverman* decisions from the Ninth and Eleventh circuits, it is timely for all law enforcement agencies to bring in their policies for a "constitutional checkup" to make sure they are not overreaching into the realm of protected speech in the name of image maintenance. And given the confusion fostered by the Sixth Circuit's against-the-grain guidance, the Supreme Court should accept the earliest opportunity to underscore that speech unflattering to the government does not lose protection merely because the speaker is a knowledgeable government insider whose medium of choice is a Facebook wall.

²⁹⁸ See generally Papandrea, *supra* note 151 (describing how government agencies increasingly use regulatory authority to protect their "brand" from being tarnished by criticism, and questioning whether maintaining government agencies' reputations is a legitimate exercise of state power).

²⁹⁹ See Richard Thompson Ford, *The Outrage-Industrial Complex*, AM. INTEREST (Dec. 7, 2019), <https://www.the-american-interest.com/2019/12/17/the-outrage-industrial-complex/> [<https://perma.cc/6ZLL-4CB3>] (observing that "the largely symbolic controversies of the culture wars" have occupied the public discourse to the point that serious issues of governance are drowned out).